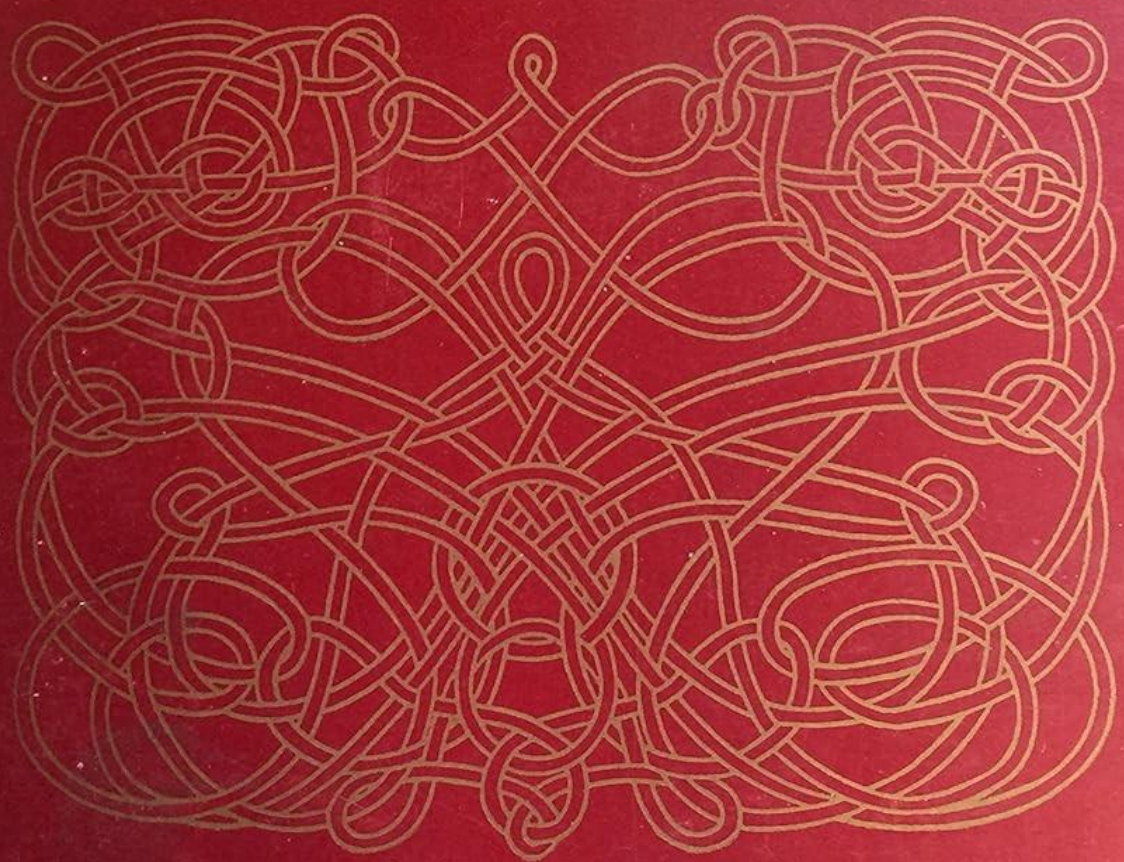
M. B. Hooker

THE PERSONAL LAWS OF MALAYSIA

An Introduction



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An Introduction

M. B. HOOKER

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This book is dedicated to
the Bench, Bar and Law Reporters of
the Straits Settlements and Federated and
Unfederated Malay States, North Borneo and
Sarawak, and Malaysia and Singapore who,
between them, created the Personal Laws.

PREFACE

THIS book is written in the hope that it will be of use to the Malaysian practitioner and if it fulfils this aim then I shall be amply repaid for the effort of writing it.

It is my pleasant duty to acknowledge the help I have had in preparing this book: Cik Shaikha binti Abdul Rahman Alsagoff very kindly allowed me to consult her M.A. dissertation for part of Chapter 2. Professor J. Duncan M. Derrett of the School of Oriental and African Studies, University of London, read a draft and made many useful criticisms. The responsibility for any errors or omissions, however, lies wholly with me.

I should also like to acknowledge here the great debt which I and all students of Malaysian law owe to the late Dr. Bashir Mallal. His advice and kindness were invaluable to me; I should like this book to be taken as a token of my gratitude to him.

Finally, my wife typed an untidy manuscript and I owe a great deal to her care and criticism.

The law is stated as at 31 December 1973.

Eliot College,
University of Kent at Canterbury,
April 1974

M. B. HOOKER

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INTRODUCTION: PERSONAL LAW

PERSONAL laws may best be described as laws which apply to specific groups of people who are defined according to race ('Chinese') or religion ('Muslim') or, occasionally, both ('Hindus'). In Malaysia[1] these and other classes of person form discrete parts of the total population but the respective laws of each group are not just limited to the members of a group but are limited also in their area of applicability. The general law for the population is the introduced English law as amended in substance by later statute often modelled upon an English original. The judicial process is also based upon English practice in which the position of the judge, and hence precedent, is primary. It is within these constraints that the Malaysian personal laws exist; they are found in case and statute just like any other branch of the law. In addition they are primarily confined to family law matters and, in the case only of the Malay and Dayak adats, to land matters.

The subject of personal laws cuts across the usual sub-divisions of law, such as contract, property, family law and so on. Since most topics in both the study and practice of law are organized under the latter subject heads, personal law is or can be an unfamiliar or confusing topic for legal study. The possibility of confusion is not made any less by the fact that particular personal laws bear no necessary relation to one another though some, such as adat and Islamic law, do exhibit important points of contact. On the other hand, the subject is not necessarily difficult just because of a lack of obvious coherence. Indeed, a good deal of the difficulty disappears when it is remembered that the subject is essentially made up of the familiar principles of common law applied to dealing with the admission of the facts of a foreign culture including the legal components of that culture. In all cases it is the English law which determines what is and is not admissible. Similarly, since the seminal phase of Malaysian personal laws was in the colonial period, certain classes of law such as crime or public order generally, as well as constitutional and administrative law, are excluded from the scope of contemporary personal laws. Most commonly the principles of personal laws admitted in the colonial period and continued today

are those which were felt to be necessary or conducive to the peace, order and good government of the state. They thus include family law particularly where religion is involved, and parts of the law relating to property, contract and equity.

The development of Malaysian personal laws to their present state is essentially the creation of the judiciary. In part this stemmed from a direct instruction to the courts from the very earliest days to administer the law with due regard for the manners, customs and religions of the inhabitants. In part also it derived from the duty of the judges to interpret statutes in a manner suitable to the multi-racial nature of Malaysian society. In addition, the judges were also faced with the operation of specific legislation directed toward a particular racial group which had, somehow, to be dealt with on the ordinary principles of judicial precedent and interpretation. Such technical requirements on the courts necessarily involved the use and, more important, the adaptation of the technical rules of procedure. A too strict reliance upon such rules was impossible though this did not come to be fully realised until the middle years of this century, comparatively late in the development of personal laws. Throughout the whole period of this development the judges kept firmly in mind the principle that English law was the law of general application and that the personal laws were exceptions to carefully defined portions of that law. Such parts of the personal laws as were admitted were allowed subject to principles of repugnancy, natural justice and so on, and their validity was constantly questioned in the application of precedent. This by no means excluded some rather peculiar results, for example, that the Chinese are 'polygamous by nature', but it did serve to give a common form to all the personal laws. Such laws are 'law properly so called' because they appear in the form of case and statute. In this respect they are not strictly analogous to the admission of custom in the courts of England nor are the principles for the admission of custom in England comparable to the situation of personal laws in Malaysia.

Having said this, what is it that the personal laws particularly require from those interested in them? The short answer to this is that the student of personal laws must be willing and able to see each of these laws in the broadest possible perspective. This has at least two aspects which we may term respectively the technical and humanistic. The first of these is of interest primarily to those who are concerned in some way with the administration of the law. It is essential that the professional have a relatively broad knowledge of

the principles of various topics in law because each of the personal laws raises a variety of subjects. For example, in the Malay adats a knowledge of the Torrens system of land registration is required. Indeed, in the adat perpateh areas a more specialist knowledge of endorsement, caveats and certain sections of the National Land Code are necessary. So far as Chinese personal laws are concerned one must have some familiarity with the legislation relating to family law and with general principles of equity particularly the rules relating to perpetuities. These and similar examples could be repeated at greater length but what has been put forward suffices to show that a narrow and rigid subject approach to law is not sufficient. This does not mean to say, however, that the student of personal laws is required to be a legal polymath but it does emphasize that the cases on personal laws be read with an appreciation of the wide range of subject matter with which they deal.

The second aspect, the humanistic, is just as important and even of more fundamental import in the context of the further development of Malaysia. It requires that the knowledge of personal laws be not confined to the law reports and statutes. Instead we must look beyond these forms of law to the cultural realities which lie behind the bare rules as stated in the judgments. For example, to understand Islamic law properly one must know something of the religion of Islam. Similarly, many of the cases in Hindu law concern the joint family and one must know something of the cultural and social life of the Indian community to properly read and understand the significance of the cases on the point. The writer's own experience on the Malay adats demonstrates again this necessity. I found that to understand the cases and statutes on adat I had also to learn something about the society within which this adat existed. A good deal of attention now needs to be concentrated on this aspect of personal law study not least because of the necessity for a wider understanding of Malaysian cultures. The social significance of the law is not to be found only in the law books but in the lives of the persons to whom the law applies and whose activities it affects.

The issue of national unity, which is primarily a political question, appears in legal guise in the question of legal pluralism *vis-à-vis* a unified system of law. To a large extent, of course, the law of Malaysia is a unitary whole, especially in the sense that there is a common form of law and *fora* for law. Perhaps as a contrast to this unity the separate personal laws tend to stand out in an even greater relief. But the position in Malaysia is by no means as fragmented as might appear at first glance, particularly as contrasted with that

in neighbouring Indonesia. In addition, there has recently been a significant move to unify parts of the law, primarily family law, toward the aim of providing a unified body of substantive law for all sections of the population not wholly excluding the Muslims.[2]

Having said this it must be emphasized that the matter put forward in this book does not pretend to be more than introductory. Attention has been concentrated upon those aspects of the personal laws likely to be of use to the legal profession and to law students. This has meant a somewhat summary treatment based in case and statute although in chapters 7 and 8 some of the wider issues raised by the personal laws are indicated. However, apart from these two chapters, the description is confined to the peculiar features of each personal law. Some, such as the Chinese and Hindu laws, are founded almost wholly in case law whilst others, such as the Malay and Dayak adats and Islamic law, are matters for both case and statute. Each is concerned with a variety of subjects, or raises a variety of topics in law; land law is particularly important in the adats. Family law is prominent in Islamic law and in the generality of personal laws. Hindu law is often concerned with commercial law and Chinese law raises questions of equity. Some of the personal laws, most notably Islamic and adat law, raise questions involving politics. Each of these aspects requires its own special treatment although it has not been possible to deal in detail with each law within the confines of an introductory work. General questions of religion and politics, for example, are not dealt with and nor is the question of historical development; the latter must await the general legal history of Malaysia which is yet to be written. However, it is hoped that the material provided in this book will stimulate further studies on these topics. It is also desirable that this future work utilize indigenous material, Chinese, Malay and Indian, to an extent greater than has been possible here.

Finally, it is worth pointing out that situations of legal pluralism are the norm rather than the exception particularly in Asia and Africa. Of the laws described in this book, four are found in a variety of foreign jurisdictions. Islamic law governs the majority of the populations in the Middle East,[3] it is the official law of Pakistan,[4] it is a personal law in India[5] and, to a limited extent in Indonesia[6] and the Southern Philippines. Hindu law is found in East Africa[7] and the West Indies[8] as well as in India.[9] Chinese personal law is still an operative system in Hong Kong[10] although it is no longer a viable personal law in Indonesia or Vietnam.[11] The adats of course still apply throughout Indonesia.[12] In addition the colonial

histories of Britain, France, the Netherlands, Belgium and Portugal have left large areas of Asia, Africa and Polynesia subject to imported legal systems which co-exist in a variety of ways with indigenous laws.[13] Further, the modernization and development plans of such states as Thailand[14] in Asia and Ethiopia[15] in Africa have involved the introduction of legal systems patterned on Western models which have not become fully effective in those states. Even in the so-called 'Old Commonwealth' and in the U.S.A. and the Republic of South Africa elements of legal pluralism remain important.[16] Each of these cases attests to the continuing strength of personal laws and to their value in a variety of cultures. The personal laws of Malaysia are a yet further example of the value of such legal traditions.

1. The State of Malaysia is the successor to the former Straits Settlements (excluding Singapore), Federated and Unfederated Malay States, North Borneo and Sarawak.
2. See Chapter I and the Appendix.
3. For general sources see the following: Schacht (1959) (1964), Anderson (1959) (1966).
4. See Coulson (1957) (1963) (1969).
5. See Fyzee (1962) (1964).
6. See Lev (1972).
7. See Derrett, 1963: 535–56.
8. See Patchett (1959).
9. See Derrett (1963) (1968) (1970).
10. See Greenfield (1958), Emrys Evans (1971). For the effect of recent family law reform see Emrys Evans (1973) and Chang (1973).
11. See Levasseur (1937) for the position in colonial Indochina.
12. See Ter Haar (1948), Djojodigoeno (1952).
13. See the following sources:
    a) British Africa: Elias (1962), Allott (1962) (1970), Cotran & Rubin (1970).
    b) British India: M.P. Jain (1966) for sources and the references cited n. 9 above. For Burma see Mootham (1939), Maung Maung (1963).
    c) French Africa: Salacuse (1969), Dareste (1915).
    d) French India: S.C. Jain (1970).
    e) French Indochina: Morché (1931). See also Philastre (1876) for a version of the Annamite Code. The most valuable single source is the journal, *La Revue Indochinoise*, published at Hanoi 1937–1942 which contains law reports and legislation as well as valuable papers.
    f) Belgium: Salacuse (1969), Sohier (1957).
    g) Netherlands: Ter Haar (1948).
14. On Thailand see Thornely (1923).
15. See Redden (1968). See also the valuable papers in the *Journal of Ethiopian Law*.
16. See the following sources:
    a) U.S.A.: Cohen (1945).

b) Canada: Lysyk (1967).
c) Australia: Berndt (1960–2), Eggleston (1972), Hookey (1972).
d) Australian New Guinea: see the contributions in B.J. Brown (1969).
e) New Zealand: Smith (1960).
f) South Africa: Seymour (1953).

1

PERSONAL LAWS AND CONFLICT OF LAWS

Introduction: Common Law and Personal Laws

FROM the earliest periods of colonial occupation English law has been the law of general application in Malaysia.[1] This law has, however, undergone a process of adaptation and modification which has in significant measure been an accommodation to the various personal laws of the area. Personal laws are laws which apply to certain defined classes of people, defined either upon racial grounds ('Chinese', 'Malay') or upon religious grounds ('Muslim'), or occasionally upon both ('Hindu'). The accommodation between these laws and the received English law took place upon a number of grounds specified by English law itself. It is important to mention these not least for the sake of completeness but also to illustrate the use of common law principles. The major grounds are as follows:

(a) THE CHARTERS OF JUSTICE

There were three Charters of Justice which governed the legal principles applicable in what later grew to be the colony of the Straits Settlements. The first was granted to the East India Company in March 1807 and set up the judicial administration in the Presidency of Penang. The second was granted to the East India Company in November 1826 and extended the jurisdiction of the Court to cover Singapore and Malacca. The third Charter was granted in August 1855.[2] All three Charters have been held to direct that English law was to be the only law in the various settlements but was to be applied only in so far as the religions, manners and customs of the inhabitants would permit.[3] The effect of this provision has been to give effect to personal laws in, for example, the interpretation of instruments drawn in English form.

(b) THE REASONABLENESS OF CUSTOM

There is some evidence to show that the Courts have applied a test of reasonableness of custom which is closely analogous to the

reasonableness test used in proving English internal custom. The earliest case on this point is *Sahrip* v. *Mitchell & Endain*[4] where the indigenous forms of Malay land tenure ('customary land tenure') were left unaltered in Malacca. This system of land tenure, which provided for the payment of a tithe, or one-tenth of the total produce, was expressly approved as being a 'good and reasonable custom' (*Maxwell C. J.*). The Courts in Sarawak, however, have limited the use of this test by demanding that any custom must be recognized either expressly or impliedly by a Sarawak Ordinance.[5]

(c) NATURAL JUSTICE

This test has been not infrequently used to justify the application of personal laws and, in some cases, to withhold this application. An example of the latter situation is to be found in the case of *Mong binte Haji Abdullah* v. *Daing Mokkah bin Daing Palemai*.[6] This case concerned a breach of promise to marry where both parties were Muslim. The Court decided that Muslim law should not be applicable on the ground that its strict provisions were contrary to natural justice and would result in hardship.

The personal laws are now found in judicial decision and occasionally there is specific legislation applicable to them. To this extent personal laws are merely a category in and part of the laws of Malaysia. However, and in spite of such formal similarities, personal laws are often treated as a special and distinct part of the general law which is often indicated by referring to them as 'customary laws'. This usage, which is wholly unsuitable,[7] tends to disguise a real point of distinction and indeed of departure for personal laws as contrasted with any other branch of the law. It rests in the fact that the substantive contents of the personal laws contain foreign elements which, like all foreign elements incorporated or added into a host system, tend to cause a certain degree of irritation. In the Malaysian case the result is that suits often result in a conflict of laws within the bounds of the state. The matter is further complicated by the fact that the received common law itself includes a body of rule and principle (private international law) which is designed to deal with conflict problems but only conflicts which arise with the law of a foreign municipal system. This has not, however, prevented the use of such principles in dealing with personal laws.

The earliest expression of private international law principles appeared in *Chulas* v. *Kolson* decided in 1867.[8] In this decision Maxwell C. J. said:

... their own laws or usages must be applied to them [the Muslims] on the same principles and with the same limitations as foreign law is applied by our courts to foreigners and foreign transactions.

Not surprisingly, private international law modifications have been well illustrated in cases involving Chinese polygamous marriages and in adoptions and legitimations springing from these unions. Taking marriage first, the rule at English law is that capacity to marry is determined by the domicile of the parties at the time marriage takes place.[9] In the nineteenth-century Straits Settlements, and indeed well into the twentieth century, many of the parties to marriages were immigrants. The conception of domicile was therefore often applied to determine essential validity (and often to determine formal validity as well). The cases are well known and need no restatement here.[10] The guiding principle to be drawn from these cases seems to be that the Chinese, according to the law of their domicile as understood by the Courts, are polygamous. The common law in Singapore was, however, clearly to the effect that marriage was a monogamous institution.

Second, in respect of a husband's rights over his wife's marital property, the law in Singapore was the common law by virtue of the Married Women's Property Ordinance of 1902.[11] But the Courts had held that in regard to a Chinese marriage a husband who was domiciled in China at the time of the marriage had no rights in respect of his wife's property.[12]

Third, English conflict rules have been applicable in the fields of legitimacy and legitimation by subsequent marriage. The results of the cases show variations from the strict common law rules of the nineteenth and early twentieth centuries.[13] English conflict rules have also been applied in a large number of cases involving Muslims[14] and Hindus.[15]

The process of adaptation shows clearly the need for compromise which was forced upon the courts in Malaysia and Singapore. However, with the post-war increase in the nature and activities of legislative institutions the field for compromise has been restricted and the scope for more open conflict has been increased. This has been paralleled by a diminution in the authority of the Charters which in any case never applied in the present states of Malaya with the exceptions of Malacca and Penang. Traditional private international law has now to operate not only on its own principles and criteria but has also to face the variety of personal laws in their extra-territorial and legislative aspects. With the recent separation of Malaysia and Singapore into two separate states these problems

are aggravated. The outstanding example of these difficulties is to be found in respect of Islamic law, the personal law of all Muslims in Malaysia and Singapore. In both Singapore and in the states of Malaysia Islamic law is now administered in part by special *Shari'a* courts who found their jurisdiction solely upon a religious qualification. There is a clear possibility of a conflict as to jurisdiction between these Courts and the 'secular' High Courts of both states in various fields, e.g. on the validity of a second marriage after genuine conversion to Islam whilst a first marriage is still in force. This is dealt with in more detail below. We should also note that the Chinese ('racial'?) personal law is also not without its problems. In the following part of this chapter some attempt will be made to point out these difficulties and suggest some remedies.

Current Conflict of Laws Problems

We may best approach these problems through a brief consideration of recent judicial decisions and statute. In both these cases there have been attempts by the Courts to apply traditional private international law principles. The results have not in all cases been desirable.

(a) Judicial Decisions

The first decision with which we are concerned is that given by the Singapore Court of Appeal in *Re Maria Huberdina Hertogh: Mansor Adabi* v. *A. P. Hertogh and another.*[16] The background to this decision is as follows: Maria Hertogh had been left in Indonesia during the Japanese advance in 1941. She was cared for and brought up as a Muslim girl by a servant of the respondent. The respondent had managed to trace her whereabouts after the war and attempted to regain custody of his daughter. This was resisted by the girl's foster parent and resulted in an action in the Singapore High Court where the respondent was successful. At the same time, however, the girl was married to the appellant in the present case. Her age at this time was fifteen years. The Court was asked to decide upon the validity of this marriage (which was valid at Muslim law): the Court found as a fact that the girl was an adherent of the Muslim religion.

However, at Dutch law, the law of her father's domicile, she had no capacity to contract a valid marriage except with certain permissions which had not been obtained. The Court held that as the girl was a minor she had a domicile in Holland, following her father's domicile,[17] and the marriage was therefore declared a

nullity. So far as Muslim law was concerned the marriage was valid, considerations of domicile being irrelevant.

Two points arise from this result. The first is that though technically correct it gave rise to undesirable and dangerous consequences. The publication of the decision resulted in several days of rioting in Singapore on the part of the Muslim community and the point of view of this community can readily be seen. The girl after all was a Muslim. This leads us to the second point: the Court found that the girl was in fact a Muslim. It also found as a fact that she had a domicile in Holland though she had never been there: the imputing of this domicile to her was thus arbitrary, or so it could be argued. The Court had a clear choice and it based its choice upon what it said were the best interests of the child, though what these were is not immediately apparent from the report.

The point I wish to make here is that in cases of this sort of face-to-face conflict, the rules of private international law provide no criteria for any choice. In a recent article, one author[18] comes to the conclusion on the basis of Indian cases, that the law of the domicile should determine personal law and that this law will then govern capacity to marry. But this does not really solve the problem where the forum applies personal laws as the law of the domicile which may very well not allow any choice in respect of personal (e.g. religious) law. In addition, whatever may be the situation in India, the courts in Malaysia have generally become somewhat more wary in applying principles of conflicts in recent years. (See below on 'Judicial Policy'.) On the other hand, the Muslim legislation in Malaysia and Singapore does not cover the situation of a Muslim who becomes converted to Christianity. If he already has two wives then the law of the church will regard him as married to his first only and, if he is domiciled in one of the states of Malaysia, there is no procedure by which he can divorce his second wife. The situation of conversion *from* Islam has not received any consideration.

For these reasons the 'domicile' solution cannot be effective in Malaysia and Singapore. The criterion suggested for Malaysia and Singapore is to replace in part the notion of domicile with that of the 'proper law of the person'. That is, the law governing capacity to contract a marriage must be the religion and law (thus the personal law) of the place with which the party to an action is most closely associated at all material times both before and at the time of commencement of the action. This is quite frankly a criterion of convenience. It answers the situation in the *Hertogh* case where the conflict took place within one territorial area with which both parties

were connected. It does not answer the situation where one party has a foreign domicile.

This situation, again concerning Islam, is illustrated in *Martin* v. *Umi Kelsom*.[19] It presents the opposite situation to *Hertogh* in that the Muslim in this case was incapacitated by her personal law from entering into a valid marriage. The marriage was celebrated in Selangor (Malaysia) between a Muslim woman domiciled there and a man whose domicile was England. The marriage was celebrated under the Christian Marriage Enactment[20] before a Registrar of Marriages even though under Muslim law the woman had capacity to marry only a Muslim. The Court took jurisdiction in the later divorce proceedings on the grounds that at the time of the suit the parties were domiciled in Selangor, that the marriage was celebrated there, and that one party was resident there and one domiciled there at the date of the marriage.

The only question for decision was the problem of which law governed the validity of the marriage. The Court in Selangor assumed that principles of private international law would apply and proceeded to hold the marriage valid.

The question of validity was decided upon authority of *Sottomayor* v. *De Barros* (No. 2).[21] This case however has no application since the incapacity in the present situation is one recognized by the law of the domicile which is also the law of the place of celebration of the marriage. The judge in coming to the conclusion which he did seems to have reasoned as follows:

(i) The law governing capacity under English private international law rules is the law which the parties choose, or the law which governs the question of formality.

There is no authority for this and it cannot be justified in principle.

(ii) The High Court of Malaya will not recognize an incapacity of a person domiciled within its jurisdiction, provided the marriage would have been valid if celebrated in England.

This once again cannot be supported because the reason for the refusal to recognize such an incapacity is based upon considerations of *English* public policy. Section 3 of the Divorce Ordinance, 1952, does not direct Malayan Courts to decide an issue as an English Court would decide the issue.[22]

It is submitted that the correct thing to have done in this case would be to have given effect to Sir Jocelyn Simon's statement in *Cheni* v. *Cheni*[23] though this would still not have obviated the clash between the two systems of law. There seems to be no recognized solution to this sort of situation, the points of departure between the

two systems of law being so far apart: domicile and secularism on the one hand and religious adherence on the other.

The position, however, in respect of the so-called 'conversion' cases is a little clearer. These are cases in which a person who is a party to a valid monogamous marriage becomes converted to e.g. Islam and then enters into a second marriage during the existence of the first.

An interesting example of this is *A.G. for Ceylon* v. *Reid*.[24] This decision is cited in Dicey and Morris as an authority for the proposition that a Christian may contract a valid polygamous marriage if converted to the Muslim faith before that marriage, even though he is already monogamously married.[25]

The respondent, who was domiciled in Ceylon at all material times, was previously married under the Marriage Registration Ordinance of Ceylon which does not apply to Muslim marriages. The Privy Council, in dismissing the appeal by the Attorney-General, grounded its decision on prior Indian cases[26] and also on the fact that since both polygamy and monogamy are recognized in Ceylon then any person domiciled there had a right, by changing his religion, to enter any one of these two forms of marriage. The Court also pointed out that this right was not expressly prohibited by statute. Such a situation, however, is right outside the contemplation of the ordinance.

Two points seem to arise from the situation approved of in the *Reid* case. The first is a technical one as to the registration of marriages. If *Reid* is correct then a person may appear as married on two separate registers, a secular and a Muslim one. In Malaysia this would immediately raise the question as to whether the High Court or the Shari'a Court has jurisdiction over any matrimonial proceedings. Thus, for example, if both wives wished to bring proceedings against their husband to obtain payment for the support of themselves and their children this would seem to make necessary two separate actions in two courts.

The second point, apart from these practical consequences, goes directly to the fundamental question as to the status of a married person. This was raised in *Public Prosecutor* v. *White alias Abdul Rahman*.[27] This case had substantially similar facts to the *Reid* case and it turned upon the question of the status of a prior monogamous marriage. The Court held that a person who enters into a monogamous marriage relationship acquires by law the status of 'husband' and he cannot go through a legally recognized form of marriage with another woman. As in Ceylon, the Courts in

Malaysia and Singapore recognize both monogamous and polygamous marriages. In *White's* case the judge relied upon a passage from *R.* v. *Hammersmith Superintendent Registrar of Marriages*[28] to the effect that the *lex loci celebrationis* will determine the character of a marriage.[29] The first marriage in *White's* case was in no sense potentially polygamous. Even if it be argued, as Cheshire does, that the law determining the nature of a marriage is that of the intended matrimonial domicile the decision in *White* remains unaffected.

However, there can be no doubt that Islam in Malaysia does contemplate conversion and provision is made for the registration of conversion in the various state enactments on this. Prima facie, therefore, a *White* situation could arise. As was said in *Cheni* v. *Cheni*,[30] there are no marriages which are not potentially polygamous in the sense that they may become so by a change of domicile and religion on the part of the spouse. The exact effect then of these two decisions in Malaysia remains doubtful but with the legislative provisions on conversion now in effect some conflict appears inevitable.

The problems raised by Chinese law are different to the extent that no religious question is involved. In addition these problems are now almost certainly confined to Malaysia alone. Legislation in Singapore[31] has effectively prevented the continuance of Chinese customary law.

Before considering recent Malaysian decisions it is useful to have a brief look at the well-known case of *Isaac Penhas* v. *Tan Soon Eng*[32] in the light of later cases on Chinese consensual marriages. The facts of *Penhas* are well known and need no repetition here.[33] This case was concerned to apply the private international law rules relating to common law marriages to a union between a Jewish man and a Chinese woman, celebrated in Singapore by Jewish and Chinese rites. The Privy Council held that as there was consensus to enter into a marriage then the parties had in fact contracted a valid marriage at common law. In respect of marriages between two Chinese on the other hand the Courts have found that the elements of intention, cohabitation and repute are necessary to establish a valid marriage.[34]

There are thus two sets of requirements: where one party only is Chinese then the common law marriage doctrine of consensus applies. An essential element to this is that the marriage is monogamous. On earlier authority, if both parties are Chinese then three requirements are necessary.

However, in *Yeow Kian Kee decd: Er Gek Cheng* v. *Ho Ying Seng*,[35] a Chinese *secondary* marriage was found to exist solely on the basis of consensus. How is this to be reconciled with *Penhas*? If *Penhas* is accepted then the doctrine of consensus should apply to Chinese secondary marriages. On the other hand if *Penhas* is rejected then it is not possible to have a valid common law marriage except where one of the parties is racially non-Chinese. This is quite unacceptable.

These two decisions should be read in the light of *Yee Yeng Nam* v. *Lee Fah Kooi*.[36] This decision makes clear that in Malaysia it is possible for Chinese to contract marriages which may be either monogamous or polygamous at inception. It seems from the tenor of the decision that the type of marriage actually existing between the parties is a matter of fact to be proved to the Court's satisfaction. In this case the marriage was held to be monogamous because the parties were married under the Straits Settlements Christian Marriage Ordinance, 1940 which, though it does not provide that a marriage under its provisions is monogamous, enables persons married under it to enter into a monogamous marriage.

The introduction of the adjective 'Christian' in respect of Chinese marriages brings us to two recent cases which involve a conflict between two sets of municipal laws. In this situation principles of private international law appear to be almost totally inapplicable.

The first of these is *Re Loh Toh Met: Kong Lai Fong* v. *Loh Heng Peng*.[37] In this case the Court had to decide what law governed the validity of various marriages entered into by a Christian Chinese now deceased. The deceased died possessed of three wives and eleven children (of whom four were ostensibly adopted). He had been brought up a Roman Catholic though he was sporadic in his religious observances. On the evidence of this the trial judge held that the deceased was a person professing the Christian religion under the Christian Marriage Ordinance.[38] From this the judge concluded that the deceased had been obliged to marry under the Ordinance and in that all his marriages were entered into by Chinese ceremony, none of them was valid.

On appeal, however, the Court held that the deceased was not in fact a Christian and that being a man of 'Chinese race' the provisions of his customary law should apply to him. The introduction of 'Christian' into this decision is unfortunate and, because of the provisions of the Ordinance, unnecessary.[39] It is the law that a Chinese even if professing the Christian religion can enter into a polygamous marriage by Chinese customary rites. Christianity by

itself is no qualification for a state of monogamy. Similarly, the introduction of 'race' is also unfortunate. I should guess that anthropologists would not generally classify the Chinese as a race. If the Court makes this a criterion in any decision then it runs the risk in the future of having to determine whether a person of mixed ancestry is a member of the 'Chinese race'. The Court instead must concentrate upon establishing the personal law of any litigant.

One further point arises from this decision. The four adopted children of the deceased failed in their claim for a share in the estate. This was because the Distribution Ordinance 1958 of Malaya restricts the status of adoption to those persons formally adopted under the Adoption Ordinance of 1952. The Courts have consistently refused to recognize adoptions at customary law among the Chinese in Malaya and this has caused not inconsiderable hardship. The Chinese themselves feel a sense of injustice at this state of affairs.[40]

The second example of this situation is *Re Ding Do Ca.*[41] The issue in this case was whether or not a Chinese who had married under the Christian Marriage Enactment[42] could subsequently contract a marriage under Chinese custom whilst the first marriage was still subsisting. The Court held that he could as there was nothing in the Enactment which corresponded to s.4 of the Civil Marriage Ordinance[43] which would prohibit such a union (Thomson L.P.). In effect the judge refused to equate Christianity with monogamy but instead equated 'Chinese' with polygamy.

It is submitted that both equations are wrong and subject to the difficulties of proof outlined in respect of *Loh Toh Met.* The solution appears to force a return to a factual ascertainment of personal law leaving aside as irrelevant race or Christianity. In the case of a Chinese Muslim the position is different. He is subject to Islamic law: the faith includes a legal system. A Chinese Christian, however, is not subject to 'Christian Law': there is no such thing. He is governed by his personal law in so far as this remains effective under statute.

The cases which we have considered show three sorts of conflict situations in Malaysia and, to some limited extent, in Singapore. First, there are conflicts of laws between two territorial states in which principles of private international law have some use. Second, these principles may also be relevant in conflicts within one territorial state, but where their use is in opposition to some system of personal law. Finally, there are situations within one territorial state where they have no applicability.

(b) STATUTES

The position outlined above has not been alleviated by relevant statutes in Singapore and Malaysia. Both states have ordinances regulating Muslim marriages and in Malaysia, though not in Singapore, Chinese customary law is still a valid system of personal law. In both states there are civil marriage ordinances which proceed upon the assumption of monogamy. However, neither these ordinances nor the respective Islamic law ordinances have machinery to cope with the conversion problems illustrated in *Reid's* case. A glance at the Women's Charter (Singapore, Ordinance 18 of 1961) will illustrate the difficulties which have arisen, specifically in respect of Chinese polygamous marriages.

Muslims were excluded from the operation of this Ordinance and with the exception of the restriction upon polygamy (i.e. Chinese polygamous marriage) and extra-judicial divorce, this ordinance is a re-enactment, with some amendment, of earlier legislation originally English. The ordinance was amended in 1967 (9 of 1967) and the amendments were designed to cover some of the awkward gaps in the original legislation.

The original Act of 1961 contained some curious provisions. Thus Part III of the ordinance relating to the celebration of marriages did not state that (non-Muslim) polygamous marriage could not be celebrated in Singapore. When this was read with the original section 3 (1) on the application of the ordinance to persons domiciled or resident in Singapore, the following situation arose. If 'residence' means no more than mere physical presence then a man who was careful to keep his domicile and residence in Malaysia could marry polygamously in Singapore. Any children of such a marriage however would unfortunately be illegitimate. This state of affairs has now been remedied by the amendment of 1967, sections 3(b) and 4(b). Non-Muslim polygamous marriages are now not possible in Singapore.

A more serious consideration however is that concerning the purported exclusion of Muslim marriages from the scope of the ordinance. In the ordinance of 1961 s. 3(3), it is provided that no marriage, *one* of the parties to which is a Muslim, could be celebrated under the ordinance. It followed therefore, that such a marriage must be celebrated according to Shari'a. But the only form of marriage valid under this law is that between a Muslim male and a *kitabiyya* (a Jewess or a Christian female). What then where one of the parties is a Muslim female, or a Chinese 'pagan' female?

This has been amended by s.3(e) of No. 9 of 1967 by substituting the words 'both of the parties to which are Muslim'. But this does

not deal with the situation in the *Reid* case, *supra*, where there is a case of genuine conversion after a prior monogamous marriage. There is thus a strong possibility of a conflict of jurisdiction between the High Court and the Shari'a Court. The introduction of the new section 166a (under s.41 of No. 9 of 1967) providing for registration does not help matters. The position now is that it is possible for a man to appear as married on two different registers. If he gets a domicile of choice in Malaysia, where the Shari'a is the same as in Singapore, what law governs, e.g., questions of nullity or divorce? In this sort of situation is *P.P. v. White* (*supra*) a binding authority? The rules of precedent would suggest that this is so.[44]

Conflicts of Law and Judicial Policy

The outline presented above has sketched the range and complexity of possible conflicts of laws situations in Malaysia and Singapore. In some of these conflicts principles of private international law are sufficient to resolve the legal problems which arise. In others these principles are not relevant.

We may summarize the alternatives as follows:[45]

(a) First, there are the 'traditional' private international law situations where there is a conflict between two systems of municipal territorial law, either statute or case law. This includes not only conflicts between, say, the municipal systems of Singapore and Malaysia, but also conflicts between the laws of the various states within the Federation. For example, consent is a possible ground of divorce in Sarawak though in no other part of the Federation. These conflicts are of course inevitable in a federal system and the rules of private international law provide possible solutions.

(b) Second, the opposite situation arises where there is a conflict between two systems of personal law within one territorial entity; adat and Islam or Islam and civil law or (in Malaysia) Chinese law and civil law. Here, private international law is totally inapplicable. Its premises and methods of domicile, *renvoi* and so on have no place in the determination of any suit. This must be resolved on the premises of the personal law itself or, where statute is involved, on principles of statutory interpretation.

(c) Third, and most difficult, there is the intermediate situation where private international law and personal laws conflict. *Reid's* case, *White's* case and *Hertogh's* case are examples of this. Similarly, a Chinese who has contracted valid polygamous marriages in Malaysia and who gains a domicile of choice in Singapore may enter into a suit giving rise to a similar conflict.

In this situation private international law is of limited use since it provides no criteria for resolving this conflict. It pre-supposes that the foreign legal system with which it is in conflict is one not affected by such factors as religion or race. It also pre-supposes that a foreign system possesses its own body of conflict rules to which reference may be made. Neither of these suppositions is necessarily valid in Malaysia or Singapore.

It is not easy to propose a solution to this conflict. The Malaysian common law does contain within itself conflicting provisions. The most that could be proposed is a selective application of conflict of laws principles and there is already a not inconsiderable body of precedent which would support such a view. This view may be interpreted as eliminating the question of whether or not the law of the domicile permits the adoption of a personal law. On the face of it there may seem little in favour of such an alternative but it may be argued that the cases raise questions of *local* family law rather than international conflicts *per se*. This is in no way affected by the existence of Malaysia and Singapore as separate political units. Both states share common precedents in the cases mentioned here. At the time of writing Malaysia is preparing a bill to reform the laws of marriage and divorce (for non-Muslims) and this legislation is largely identical in its provisions for compulsory monogamy with the provisions of the Singapore Women's Charter. The question of international conflict is therefore not of primary importance (but see below). The courts in the past have never felt themselves strictly bound by considerations of private international law and the reports contain many cases in which such rules have, in effect, been avoided. For example, in the recent case of *Chua Mui Nee* v. *Palaniappan*[46] an Indian who had married in India took a Chinese woman as his wife in Malaya. The marriage took place according to Hindu rites but it was alleged that not all the formal requirements were complied with. It was held that this did not render the marriage invalid because this was not a Hindu marriage proper but a marriage between a Hindu and a Buddhist. The *lex loci contractus* was therefore not Hindu law but (Malaysian) common law. The marriage, however, could not be a *common law marriage*[47] because it was not monogamous. The court therefore relied upon a *dictum* in *Carolis de Silva* v. *Tin Kim*[48] as to the *lex loci:*

> The law will presume a contract of marriage from evidence of cohabitation with the habit and repute of matrimony without any, or with imperfect formalities for its commencement.

Now this *dictum* and the result in *Chua's* case are no authority for some new conflict rule that compliance with the formalities of the *lex loci* is not necessary for a valid marriage if there is cohabitation and repute. Indeed it might even be said that the concern of the court was not to decide formal requirements as such [49] but to ensure a decision which would prevent the bastardization of the offspring of these unions. It was regarded in both cases as crucial that children had been born and these cases are in a long line of the *selective* reception of common law rules.[50] The basis of early judgments in the Straits Settlements was the adaptability of English law to admit personal law systems: it has already been said that personal laws are part of Malaysian common law but this law contains conflicting elements. The probable enactment of a new uniform marriage and divorce law for non-Muslim sections of the population will not immediately dispose of the present difficult situation. The problem remains with the courts and is likely to stay there for the foreseeable future. There seems little point in a rigid adherence to principles designed for a quite different situation so far as the Malaysian courts are concerned. Where there is a genuine international element then different considerations may apply. The major point after all is that the conflict is an internal conflict within the legal system and inside the territorial boundaries of the state. Contemporary legislation confuses still further rather than mitigates the situation. This is primarily because so much Malaysian legislation is based directly upon an English model and English precedent is more or less inevitably cited in suits arising out of such legislation. In the absence of drafting for specifically Malaysian circumstances it is difficult to see how this can be altogether avoided. The special difficulty of course is that such legislation more often than not creates an extra set of problems in the field of personal law conflicts. It is doubtful, for example, whether the Women's Charter does really limit the capacity of a domiciled Singaporean to marry polygamously and one may cite precedent from the United Kingdom in coming to this conclusion.[51]

The reform legislation in Malaysia[52] is unlikely to fare any better in this respect.

A suggested test which would possibly avoid the worst excesses of an undue reliance upon conflict rules as such[53] might be for the court to consider to what law or system of laws an individual is 'attached'. In this case the court would attempt to ascertain the system of law by referring to such factors as way of life, religion, place of residence, intent, and so on. It may be objected that this

is merely the old domicile under a new name[54] but there is one significant difference. This is that in practice it would involve a recourse to existing Malaysian precedent unencumbered by the technicalities of precedent from outside the jurisdiction. The main point is that the conflict is an internal one and should be treated as such. There is abundant material in the cases of the last century or so on all of these points. Further, this precedent is itself at the foundation of the Malaysian common law and represents a fusion of English principles with indigenous concepts; this is more than can be said of conflict rules as such.

Current Law Reform and the Personal Laws

At the time of writing there is a bill before the Malaysian legislature, the Law Reform (Marriage & Divorce) Bill 1972, which will, when enacted, bring about considerable changes in some of the personal laws described in this book. The bill is part of and arose out of a Royal Commission on Non-Muslim Marriage and Divorce Laws set up in February 1970, and whose report is dated 1971. The terms of reference of the Commission were as follows:

(1) to study and examine existing laws relating to marriage and divorce (other than Muslim marriages) and to determine the feasibility of a reform, if any is considered necessary, in particular, in the light of the resolution of the United Nations Convention on consent to marriage, minimum age for marriage and registration of marriages;

(2) to receive and consider representations that might be submitted from any racial or religious group affected or likely to be affected by the changes or reform of the existing marriage and divorce laws; and to prepare and submit a report to the Government and recommend changes or reform if any, to be made to such laws.

The Commission considered the existing laws on marriage and divorce (excluding Islamic law) paying particular attention to the Chinese and Hindu law as well as to the difficult decisions in conflict of laws. It also considered Christian marriage and civil marriage and the legislation on these marriages. The major reforms recommended by the Commission bearing upon personal laws are the abolition of polygamy and the compulsory registration of all marriages. Polygamous unions already contracted are saved and the rights of succession and maintenance flowing from them are preserved. The bill itself is accompanied by an 'explanatory statement' which reads as follows:

This Bill seeks to lay down a uniform law on marriage and divorce, and matters incidental thereto, applicable generally to all non-Muslims

resident in Malaysia, as well as to all persons who are citizens of or domiciled in Malaysia residing abroad. Such law is necessary and expedient to replace the heterogeneous personal laws applicable heretofore to persons of different ethnic origins comprising the majority of the non-Muslim population of Malaysia with a diversity of customs and usages observed by them. The primary virtue of the proposed reforms is certainty — replacing doubts regarding the true legal status of women cohabiting with men under circumstances which may or may not be legal wedlock until the question is determined by the Courts and clarifying the legal status of their issue.

How well the bill accomplishes its stated aim can be judged from its major provisions;[55] it is essential to remember that the bill is attempting to introduce common standards to which persons of all races, languages and cultures are expected to conform. It does not entirely exclude even Muslims. It would be presumptuous and otiose to try and state the exact effect of this draft legislation but one point does seem to be reasonably clear. This is that the basic model for the bill is founded in English legislation such as the Matrimonial Proceedings and Property Act, 1970, the Divorce Reform Act of 1969 and the Recommendations of the English Law Commission's Report on Nullity of Marriage.[56] It is likely that the difficult cases in conflicts will continue despite the hopes of the Royal Commission.

1. 'Malaysia' here refers to East and West Malaysia and to Singapore which, as part of the former Straits Settlements, shares in the legal history of the area.

2. Ratified by 18 and 19 Vic. c. 93, s. 4.

3. See *R.* v. *Willans*, 3 Ky. 16; *Fatimah* v. *Logan*, 1 Ky. 259.

4. 1877 *Leicester's Reports* 466. *Journal of the Royal Asiatic Society, Straits Branch* vol. 14 (1884) Appendix III.

5. See e.g. *Wong Teck Giak* v. *Ting Ni Moi*, 1950 S.C.R. 1 & 39. *Chan Bee Neo* v. *Ee Siok Choo*, 1947 S.C.R.1.

6. [1935] S.S.L.R. 123; [1935] M.L.J. 147.

7. Apart from the vagueness and confusion which surround this term, there is also a reasonable case for supposing the common law process to be itself 'customary' in an important sense. See Simpson (1973).

8. (1877) Leicester's Reports 462. Wood's Oriental Cases (1911) 30.

9. See e.g. Dicey and Morris, 1966: R. 31 and the cases there cited.

10. *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] A.C. 346 at p. 352; *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1921] A.C. 529; *Cheang Thye Phin* v. *Tan Ah Loy* [1920] A.C. 369.

11. See C. H. Withers Payne (1932).

12. *Lim Chooi Hoon* v. *Chok Yoon Guan* (1893) 1 S.S.L.R. 72; Withers Payne, 1932: 25–7.

13. See e.g. *Re Choo Eng Choon* (1911) 12 S.S.L.R. 120 and the cases there cited.

14. *Ghouse bin Haji Kader Mustan* v. *R.* [1941–42] S.S.L.R. 269 on the Muslim law of guardianship and puberty. *Re Hadjee Ismail bin Kassim* (1911) 12 S.S.L.R. 74 on the law of India applicable to Muslim wills. *Re Haji Abdullah bin Haji Moosah* (1911) 12 S.S.L.R. 46 as to the guardianship of an infant. *Re Hadji Daeing Tahira binti Daeing* [1947] S.L.R. 78 as to a Muslim will. *Mohamed Nor* v. *Hadjee Abdullah* (1893) 1 S.S.L.R. 58 on the rights of a Muslim married woman. *Mary de Silva* v. *J. M. Yussip* (1925) 6 F.M.S.L.R. 29 on Muslim guardianship and adoption. *Meeram Lebbaik Maullim* v. *Mohd. Ismail Marican and another*, 2 M.C. (1958) on a Muslim libel. *Re Meh Allang* [1911] W.O.C. App. II, 2 on the administration of a Muslim estate. *Re M. Mohd. Haniffa* [1940] S.S.L.R. 249 on succession to the estate of a deceased Muslim who died domiciled in India. *Re Shaik Abdullah bin Ahmad* [1938] S.S.L.R. 101 on the construction of English and Arabic wills and the *lex situs* of immovable property. *Shaik Abdul Latiff* v. *Shaik Elias Bux* (1922) 1 F.M.S.L.R. 204 especially at pp. 221–3 on the validity of a Muslim will.

15. *Re Vengadasalem* [1940] S.S.L.R. 52 on the Hindu joint family. *Hurbajan Singh* v. *P. P.* [1952] M.L.J. 83 as to the validity of divorce among Selangor Sikhs. *Karpen Tandil* v. *Karpen* (1895) 3 S.S.L.R. 58 on Hindu marriage brokerage contracts. *Maniam* v. *R. Rajoo* [1958] M.L.J. 145 on Hindu marriage. *Soundara Achi* v. *Kalyani Achi* [1953] M.L.J. 147, on Hindu law as to separate property and the *lex domicili*.

16. Full reports of this case which also involved issues of guardianship will be found in the following reports: [1950] M.L.J. 214; [1951] M.L.J. 12 and 164.

17. The Court relied upon *Ogden* v. *Ogden* (1908) P.D. 46 at this point.

18. See Derrett, 1965: 1374.

19. [1963] M.L.J. 1; see also (1963) 5 *Malaya L.R.* pp. 388–92.

20. Chapter 109: revised laws of the Federated Malay States (1935).

21. (1879) L.R. 5, P.D. 94.

22. These two points are as summarized in Jackson, 1963: 390.

23. [1963] 2 W.L.R. 17 at p. 29. 'I believe the true rule to be that the Courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable.'

24. [1965] 2 W.L.R. 671 [1965] A.C. 720 (P.C.) This decision cannot be an authority in Singapore because of the Women's Charter but may be in Malaysia.

25. Dicey and Morris, 1966: 284.

26. See (1965) 7 *Malaya L.R.* pp. 181–4.

27. [1940] M.L.J. 214.

28. [1917] 1 K.B. 641.

29. See also: *Chetti* v. *Chetti* [1909] P. 67. *Maher* v. *Maher* [1951] 2 All E.R. 37.

30. [1963] 2 W.L.R. 17.

31. The Women's Charter (Ordinance 18 of 1961 as amended by Ordinance 9 of 1967).

32. [1953] A.C. 304.

33. It is cited in Dicey and Morris, 1966: 233 as authority on the following points: on the formal validity of common law marriage; on the question of monogamous marriages where one party is Christian, ibid: 279.

34. See e.g. *Re Yeo Seng Whatt* [1949] M.L.J. 60 and 241.

35. [1949] S.L.R. 78, [1949] M.L.J. 171.

36. [1956] M.L.J. 257.

37. [1961] M.L.J. 234.

38. Cap. 82 revised laws of the Straits Settlements (1936).

39. See a note on this case in Buxbaum, 1963: 383–7.

40. See Maurice Freedman, 1950: 112.

41. [1966] 2 M.L.J. 220.

42. Christian Marriage Ordinance 1956 (Malaya). This is a substantial re-enactment of cap. 109, revised laws of the Federated Malay States (1935).

43. Ordinance No. 44 of 1952.

44. See *Hendry* v. *de Cruz* [1948] M.L.J. 62, *Mohamed Ibrahim* v. *Yap Chin Hock* [1954] M.L.J. 127.

45. For a recent examination of this question in detail see Daw, 1972: 191 ff.

46. [1967] 1 M.L.J. 270.

47. cf. *Penhas* v. *Tan Soon Eng* [1953] A.C. 304. Even in *Penhas* the definition of 'common law marriage' was substantially amended by deleting the requirement laid down in *R.* v. *Millis* (1844) 10 Cl. & F. 534 that an ordained minister perform the ceremony.

48. (1904) 9 S.S.L.R. 8. This case involved the marriage of a Singhalese and a Chinese woman by an imperfect ceremony — a child was born.

49. See Daw, 1972: 185 to the contrary.

50. Even in cases involving an international element the Court in Malaysia has stubbornly gone its own way in offending against the canons of conflict of laws; cf. *Inderjit Kaur* v. *State Advocate General* [1959] M.L.J. 251. See Daw, 1972: 182 for a comment on this case. In the recent case *B.* v. *Comptroller-General of Inland Revenue* [1973] 1 M.L.J. 123 the court was invited to approve the principle stated in *Dorothy Yee Yeng Nam* v. *Lee Fah Kooi* [1956] M.L.J. 257 at 263 that personal law depends upon domicile. Instead, it was held that change of domicile did not materially affect the applicability of personal law.

'On the law as settled I must therefore hold that where a Hindu shows the deliberate preservation of his personal law, ... he is bound by such personal law, despite the fact that he has now emigrated to another country and has acquired a domicile of choice in the country of adoption.' *per* Chang Min Tat J. in *B.* v. *Comptroller-General of Inland Revenue* [1973] 1 M.L.J. 123 at 127.

51. cf. Daw, 1972: 187–90, Wee (1972).

52. Set out in the Appendix to this book.

53. The common law in other jurisdictions is only now really attempting to loosen the bonds of nineteenth century precedent on domicile.

54. See further *Radwan* v. *Radwan* [1972] 3 W.L.R. 735 and [1972] 3 W.L.R. 939 on the question of domicile, matrimonial domicile and related questions in the English High Court. See also Dickstein (1973) on the relation of this case to the Law Reform (Marriage & Divorce) Bill 1972.

55. See the Appendix to this book.

56. For an outline of some of the problems which the draft presents in its present form see Dickstein (1973), Ahmad Ibrahim (1973).

2

ISLAMIC LAW*

Introduction: Islam in Colonial Law

THE student of Islam[1] in Malaysia is presented with a clear distinction between the 'legal' and 'religious' aspects of Islam. This division was effected by the colonial legal authorities who were concerned to leave religion untouched but who subjected those rules of Islam which concerned personal obligation to the forms and procedures of English law. The intensity of this subjection varied from time to time and from place to place but it is true to say that in no part of Malaysia was Islam immune. In effect, this process resulted in extensive modifications of Islamic doctrine primarily by reducing its principles to those which the common law was prepared to countenance. The history of this process varied according to the status of the former colonial territories which now constitute the state of Malaysia, and each of these is now considered separately.

THE STRAITS SETTLEMENTS

English law was introduced into the Straits Settlements as the general law of application through the Charters of Justice but subject to such modifications as were necessary to prevent it from operating unjustly or oppressively. Marriage and divorce according to Islamic law were held valid[2] although the courts experienced difficulty in deciding suits which involved rules from different schools of Islamic law. For example, in *Salmah & Fatimah* v. *Soolong*[3] the guardian of a *Shāfi'i* female obtained an injunction preventing a marriage between her and a *Hanafi* male. The court refused to disallow the injunction on the application of the girl until she had become a Hanafi whereupon she was at liberty to marry.[4] More serious, however, were the limitations upon the court's jurisdiction which

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existed by virtue of the terms of the Charters of Justice. The court refused jurisdiction, on its civil side, to recognize suits for the restitution of conjugal rights[5] and suits involving the validity or otherwise of Muslim divorce.[6] In 1880 the Mahomedan Marriage Ordinance of that year[7] was introduced; it was intended to define how much of Islamic law was to be recognized by the courts.[8] It provided for the voluntary registration of Muslim marriage and divorce, the recognition of 'Kalis' and the regulation of married women's property. It did not enact the substantive law of Islam, nor did it prescribe authoritative texts, but in subsequent amendments[9] parts of the substantive Islamic law on family matters were progressively introduced. The ordinance and its amendments were re-enacted as Ordinance No. 26 (Mahomedans) of 1920, amended in 1923 and 1934 and finally included as cap. 57 in the revised laws of the Straits Settlements, 1936 under the title of the Mohammedans Ordinance. It remained in force in Penang and Malacca until 1959.

In some areas it is difficult to ascertain the application of the provisions of this ordinance; in *Noordin M.M.* v. *Shaikh Mohd. Meah Noordin*,[10] Islamic law was preferred to English law in determining the age of majority for marriage but in *Mong* v. *Daing Mokkah*[11] a Muslim woman was held entitled to bring an action in the civil court for damages for breach of promise to marry. English law principles were expressly applied to prevent injustice. On the other hand, the *talak* was recognized by the courts.[12] Equally serious were jurisdictional shortcomings in the ordinance. For example, section 18 of the Mohammedans Ordinance of 1936 provided for *fasah* divorce but in *Rokiah* v. *Abu Bakar*[13] the husband refused his consent despite a direction by a Kathi who ordered and registered a divorce by *khula* upon repayment of the *mas kahwin*. It was held by the Registrar of Penang that a divorce by khula could not dispense with the consent of the husband. This resulted in a deadlock, the marriage subsisted in law and the wife had no further remedy.[14]

Similar difficulties arose in respect of property; in *The Goods of Abduallah*[15] decided in 1835, it was held that a Muslim could alienate the whole of his property by will, a decision contrary to the law of Islam. The reason for this was that the court supposed the law of England to be in force to the exclusion of Islamic law in the matter of wills. It is only fair to add that this decision was harshly criticized in contemporary cases.[16] However, as early as 1865 the courts had held that the property of a Muslim woman was her own separate property in which her husband took no interest either during cover-

ture or at death.[17] But a married woman's conveyance was not valid prior to the 1880 ordinance unless acknowledged on the principle of *lex loci regit actum* as required by Indian Act XXVI of 1854. Under section 5 of this act no deed executed by a married woman was valid unless her husband's concurrence had been got and the deed was acknowledged before a judge or an appointed commissioner.[18] Section 27 of the Mahomedan Marriage Ordinance 1880 provided for the separate property of a married woman and this was continued in later legislation. However, it was not until 1929 that a Muslim woman could take proceedings against her husband for the protection and security of her own property.[19]

The Islamic law of inheritance was recognized only insofar as expressly enacted in section 27 of the Ordinance of 1880. This was interpreted to restrict 'inheritance' to property and not to an office so that a claim to succeed as an *imam* failed.[20] It was open to any Muslim to direct inheritance by will and this was subject to Islamic law on the topic. However, on an intestacy the rules of English law were to apply. This meant in effect that the Statute of Distributions[21] would determine shares in an estate subject to the qualification that where there was more than one widow then each would receive an equal share. It was not until 1923 that the estate of a Muslim intestate fell to be distributed according to Islamic law with the qualification that Islamic law could not override any local custom having the force of law prior to 1 January 1924.[22] A provision was also made for non-Muslim next of kin to inherit contrary to express provisions of Islamic law.[23]

The question of joint earnings (*harta sepencharian*) by husband and wife during coverture was not dealt with by legislation but was left to the courts. There is only one case from the Straits Settlements on this point and that is almost certainly incorrect. In *Tijah* v. *Mat Alli*[24] a wife sued her husband for a half share of joint earnings consisting of the profits derived from the sale of produce grown upon land jointly rented during coverture. A Kathi gave evidence that according to Islamic law the wife was entitled to such a share. This is quite wrong because Islamic law does not recognize jointly acquired property as a special category; the Kathi was instead reporting a Malay adat rule. The court gave judgment for the wife but on appeal this was reversed on the basis that the Mahomedan Marriage Ordinance of 1880 did not provide for the joint earnings of husband and wife.[25] The judge, therefore, applied English law.

THE FEDERATED MALAY STATES

The four states[26] in the Federation, which came into being in 1895, each had legislation regulating the administration of Islamic law.[27] As in the Straits Settlements these enactments were mainly procedural without touching any points of substantive law. They were amended from time to time and were incorporated into the Muhammadan Marriage and Divorce Registration Enactment cap. 197 of the revised laws of the Federated Malay States 1935, which remained in force until replaced by contemporary legislation. In contrast to the Straits Settlements, there is very little case law from the Federated Malay States; an early case, *Janat* v. *Sheik Khuda Bakhas*,[28] merely enforced the payment of mas kahwin in terms of statute. The legislation in general provided for the celebration of marriages by those persons appointed by the Sultans for that purpose.[29] Registration was compulsory but lack of registration did not invalidate the union. The consent of the *wali* of the bride was essential though where it was unreasonably withheld then it could be replaced by that of the Sultan of the State. Divorce had to be registered but, as in the case of marriage, lack of registration did not invalidate the divorce. A certificate of divorce was issued. It was open to females to apply to the Registrar for a fasah divorce or for a *cherai ta'alik*.

The Enactment of 1935 is silent on the matters of betrothal, remarriage of divorced persons, or impediments to marriage. However, provision for these was made in the Muhammadan Laws Enactment[30] which generally put into statutory form the rules of Islam on these matters.

The position in respect of inheritance and property is rather more complex. In Negri Sembilan these matters were and remain governed to a large extent by *adat perpateh*.[31] In the other states property jointly acquired by coverture was and is governed by specific local rules of adat.[32] Apart from these two exceptions the general law governing inheritance and property is the Islamic law admitted by the courts. Muslims may dispose of up to one third of their property by will[33] with the residue descending in fixed proportions to his heirs according to Islamic law. The cases consistently gave effect to Islamic principles; in *Saeda binti Abubakar & anor* v. *Haji Abdul Rahman bin Haji Mohd. Yusup & anor*[34] it was held that a will which tied up the testator's property for ten years was invalid under Islamic law. The principle, stated in Nawawi, that a bequest preferring one heir to another is invalid without consent,[35] was given effect to in *Re Ismail bin Rentah decd.*[36] The rule that non-Muslim

next of kin cannot inherit was also upheld.[37] This is in contrast to the position in the Straits Settlements where it was provided from 1923 that a non-Muslim could inherit as though he were a Muslim.[38]

Disputed questions of Islamic law or Malay adat could, from 1930, be referred to the State Council of any of the Federated Malay States.[39] In both the Straits Settlements and the Federated Malay States charitable and religious trusts were upheld by the courts. These generally involved trusts for the benefit of mosques[40] or for the maintenance of and provisions for persons visiting mosques.[41] Difficulties sometimes arose in the nineteenth century concerning the definition of trusts for the advancement of religion,[42] and much of the difficulty seems to have resulted from trying to introduce English and Irish precedent into local conditions. The courts, however, have never required that an alleged public benefit must be capable of proof in gifts for the advancement of religion.[43] Judicial confusion also existed over the doctrine of superstitious uses in Malaya although mainly in the context of Chinese cases. However, in *Re Haji Ismail bin Kassim*[44] objects of a trust such as the celebration of the *wakaf's* death were held not charitable. On the other hand, gifts for poor relations have been held to amount to a charitable trust.[45] When a wakaf embodies directions to make gifts the courts have tended to determine the nature of these gifts according to the English law of charities.[46] The courts have held as charitable, gifts for an annual feast for poor Muslims, for the support of poor or distressed Muslims, and for the burial of poor Muslims.[47] Bequests for poor persons who would undertake to read the Koran at the testator's grave have been held not charitable.[48]

In contemporary Malaysia wakaf is now subject to detailed legislative provision.[49]

The Unfederated Malay States

The unfederated states comprised Perlis, Kedah, Kelantan, Trengganu and Johore. Between the years 1910 and 1923 the rulers of the five states had accepted British advisers[50] whose advice was to be sought and acted upon in all matters excluding Islam and Malay custom. Statutory provisions for the registration of marriage and divorce were made in all states and these remained in force until the introduction of contemporary legislation.[51] The preindependence legislation was complex and thorough especially in the case of Kelantan. It provided not just for the registration of marriage and divorce but also gave legislative form to basic principles of Islam. For example, in the case of Johore it was judicially declared that

Muhammadan law was part of the general law of Johore.[52] It may be fairly said that in the unfederated states Islamic law was least affected by the introduced English law. However, in all the states, with the exception of Johore, the judicial recognition of Malay adats has limited to some extent the scope of Islamic law in property and inheritance matters. This is discussed in the next chapter.

The major statutes on Islamic law in the unfederated states include the following:

Johore: Muhammadan Marriage Enactment 1914, reconstituted as No. 17/1935 and amended by No. 2/1950.

Offences by Muhammadans Enactment 1919, reconstituted as No. 47/1935.

Perlis. Muhammadan Marriage and Divorce (Registration) Enactment No. 9/1913.

Kedah. Sheraiah Courts Enactment No. 109/1934.

Trengganu. Registration of Muhammadan Marriage and Divorce Enactment No. 6/1922 (A.H. 1340).

Kelantan. Moslem Marriage & Divorce Enactment No. 22/1938 amended by No. 41/1939. This was replaced by the Council of Religion and Malay Custom and Kathis Court Enactment No. 1/1953 itself replaced by contemporary legislation (see below).

Islamic Law in Contemporary Malaysia

The Federal Constitution provides that Muslim law and the personal and family law of persons professing the Muslim religion are matters in the State list, that is, they are the concern of the state government and legislatures.[53] As such, each of the states of Malaya has its own enactment relating to the administration of Muslim law. Since 1952 there has been an attempt to follow a model form of legislation, the first of such being the Administration of Muslim Law Enactment, 1952, of Selangor. The current enactments, dealing with the administration of Islamic law in West Malaysia, are as follows:

(a) The Administration of Muslim Law Enactment, 1952, of Selangor.[54]
(b) The Administration of Islamic Law Enactment, 1955 of Trengganu.[55]
(c) The Administration of the law of the Religion of Islam Enactment, 1956, of Pahang.[56]
(d) The Administration of Muslim Law Enactment, 1959, of Malacca.[57]

(e) The Administration of Muslim Law Enactment, 1959, of Penang.[58]

(f) The Administration of Muslim Law Enactment, 1960, of Negri Sembilan.[59]

(g) The Administration of Muslim Law Enactment, 1962, of Kedah.[60]

(h) The Administration of Muslim Law Enactment, 3 of 1964, of Perlis.[61]

(i) The Administration of Muslim Law Enactment, 1965, of Perak.[62]

(j) The Shar'iyah Courts and Matrimonial Causes Enactment, 1966, and the Council of Religion and Malay Custom Enactment, 1966, of Kelantan.[63]

(k) The Muhammadan Marriage Enactment of Johore.[64]

These enactments provide for the application and administration of Islamic law and for the registration of Muslim marriages and divorces. No attempt has been made to codify the Islamic law or to effect legislative changes in this law. It may be pointed out here that Islamic law in Malaysia is followed only in the field of family law. In the fields of criminal law, the law of contract and tort and commercial law, English law is followed. The only exception is that the Muslim Courts (Criminal Jurisdiction) Act[65] provides for a term of imprisonment for up to six months or a fine of up to 1,000 dollars or both for offences against the religion of Islam.

Each of the administration of Muslim law enactments constitutes a Council of Religion or Council of Religion and Malay custom. The Council of Religion is not part of Islam as such but is an administrative innovation of the Government. The Council is known as the *Majlis Ugama Islam* in Negri Sembilan, Malacca, Penang and Kedah, and as the *Majlis Ugama Islam dan Adat Istiadat Melayu* in Kelantan, Pahang, Perlis and Selangor. In Trengganu and Perak, the Council is called the *Majlis Ugama Islam dan Adat Melayu.* In Johore, the Council of Religion Enactment, 1949, established the *Majlis Ugama* in that year. Each Council is headed by the *Mufti*[66] of the state or, in Kedah, by the President of the Religious Affairs Department.[67]

The Administration of Muslim Law Enactments also define the jurisdiction of the Courts of the *Kathi Besar* (Chief Kathi) and *Kathi.* Generally, the following matters fall within the jurisdiction of the Court of the Kathi Besar: betrothal, marriage, divorce, nullity of marriage, judicial separation, dispositions of or claims to property arising out of marriage or divorce, maintenance of

dependants, legitimacy, guardianship and custody of infants,[68] divisions or claims to *sepencharian* property, determination of the persons entitled to share in the estate of a deceased person who professed the Muslim religion or of the shares to which such persons are respectively entitled, gifts *inter vivos* and settlements, *wakf* or *nazr* and other matters in respect of which jurisdiction is conferred by any written law. The Kathi Besar also has jurisdiction to try an offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment.

The Court of a Kathi can deal with all such matters as listed above, when the amount or value of the subject matter does not exceed $1,000 or is not capable of estimation in terms of money, and to try offences for which the maximum punishment provided does not exceed imprisonment for one or two months, or a fine of $100, $200 or $600. Appeals against the decision of the Courts of Kathi Besar or Kathi lie to an Appeal Committee.[69]

A betrothal often precedes a Muslim marriage in the states of Malaya.[70] There may be a formal ceremony of betrothal at the girl's house, which finalizes the contract between the two families involved. Although the law of Islam does not regard an espousal as legally binding,[71] Malay adat does recognize it as binding and, as such, all the Administration of Muslim Law Enactments, except for the state of Johore, have made provisions for breaches of the betrothal contract. Damages may be awarded to both men and women.

It is generally provided that, if one party refuses to proceed to marriage after an oral or written contract of betrothal, the party in default shall be liable, if a male, to pay as damages the amount of the mas kahwin together with other monies expended in good faith in preparation for the marriage or, if female, to return the betrothal gifts, if any, or the value thereof, and to pay as damages the amount of such other monies as aforesaid. The damages can be recovered by action in the Court of a Kathi Besar or Kathi. In Kedah, Malacca, Negri Sembilan and Perak, a male who defaults has also to pay the amount of the hantaran,[72] besides the amount of the mas kahwin and other monies.[73]

Although under the Administration of Muslim Law Enactments, the Courts of a Kathi Besar or Kathi have jurisdiction to determine all proceedings relating to breach of promise to marry, it has been held in *Nafsiah* v. *Abdul Majid*[74] that the Courts of Judicature Act, 1964, bestows upon the High Court also the jurisdiction to entertain claims for such damages, including those relating to Muslims.[75] This case was brought in the High Court of Malacca by the plain-

tiff who had been seduced by the defendant, who was a married man. The court held that the promise to marry made by a Muslim married man was valid. The plaintiff's knowledge that the defendant was already married did not invalidate the promise, as the defendant was, under his own personal law, entitled to marry more than one wife. The court also held that there was sufficient evidence that the defendant had promised to marry the plaintiff, and damages for the breach were accordingly awarded. This case, therefore, determined two points: one is that a promise to marry made by an already married Muslim man is valid, and the second is that action for proceedings relating to breach of promise to marry can be brought not only to the Courts of the Kathi Besar and Kathi but also in the High Court in every state of Malaysia (see further below).

The administration of Muslim law enactments do not specify a minimum age of marriage. Generally the law of Islam is followed in that minors[76] may be given in marriage only by the *wali muzbir*, that is, the father or grandfather. Under the Hanafi school of law a minor girl who has been given in marriage by a guardian has the option of repudiating the marriage on attaining puberty. This is not possible for Shāfi'i Muslims; in fact, the father or paternal grandfather has the power of compulsion in the case of a virgin. According to Nawawi,

> A father can dispose as he pleases of the hand of his daughter without asking her consent, whatever her age may be, provided she is still a virgin. It is however commendable to consult her as to her future husband; and her formal consent to the marriage is necessary if she has already lost her virginity.[77]

In practice, at least in recent years, the consent of the parties is obtained before a marriage is solemnized. In two states of West Malaysia, Kelantan and Trengganu, it has been expressly enacted since 1953 and 1955 respectively that a marriage is void unless both parties to the marriage have consented thereto.[78] A similar provision is enacted in Pahang, but it is expressly stated that this does not apply where the marriage is by the wali muzbir.[79] Since 1962 in Selangor and 1963 in Negri Sembilan and Perlis, the parties to a marriage are required to apply on a prescribed form expressing their willingness to marry.[80] The bride is, however, not required to sign the entry in the register of marriage.

Under the Shāfi'i school of law the consent of the woman to a marriage should be given through her wali or guardian for marriage.[81] When there is no natural wali, or where the wali refuses his consent to the marriage, the Ruler, or a person delegated by him,

can be the wali of the woman.[82] Such wali is known as the wali *hākim*, or *wali raja* in Malay. All the administration of Muslim law enactments of the states of West Malaysia contain provisions for the wali raja in cases where there is no wali or where the wali refuses his consent without adequate reasons. In Perlis, Pahang, Trengganu and Kelantan it is provided that in such cases consent must be obtained from the wali raja, that is, the Ruler or his delegate.[83] In Negri Sembilan the Registrar for the *kariah*[84] is given the authority to solemnize such marriages.[85] In Malacca, Penang and Kedah, the approval of the Kathi Besar or Kathi has to be obtained in instances where the wali does not consent to the marriage.[86] In Selangor, the approval of the Sultan is required before any such marriage can be solemnized by the Registrar of Marriages.[87] The Administration of Muslim Law Enactment, 1965, of Perak contains an interesting provision in that, where a wali of the woman to be wedded refuses his consent without reasonable cause, the marriage may be solemnized by a Kathi or the Kathi Besar, provided that the woman has reached the age of eighteen years or more.[88] This means that it is impossible for a girl of below eighteen years of age to marry unless her wali consents to her marriage. It may be pointed out here that, according to Nawawi, it is an abuse of power on the part of the guardian if he refuses to give his consent to a marriage, according to the wishes of an adult sane woman, if the man is a suitable person. But it is not considered an abuse of power where a woman wishes to marry a particular individual and her father wishes to marry her to another person who is also suitable.[89]

As regards the solemnization of marriage in general, the Administration of Muslim Law Enactments of the states of West Malaysia provide that marriages shall be solemnized either by persons authorized to do so by the rulers, or by Registrars of Muslim Marriages, or by persons permitted to do so under Islamic law.[90] In the latter case the Shāfi'i school of law provides that a wali, or a person authorized by him, can solemnize a marriage. Under the enactments, permission has to be obtained from the Registrar of the kariah or, as in Selangor, from an Imam[91] of a mosque, before a marriage ceremony can be performed by a wali or a person permitted to do so under Islamic law.[92] It is also enacted that, before a Registrar can solemnize a marriage, he has to make an enquiry and satisfy himself that there is no lawful obstacle to the marriage under Islamic law or Malay custom.[93] In Pahang, Kelantan and Trengganu the respective enactments of these states expressly provide that a marriage shall be void and shall not be registered unless all conditions

necessary for its validity under the tenets of the school to which the parties belong have been satisfied.[94] In Johore, however, only the Kathi or the *Naib Kathi* appointed under the Muhammadan Marriage Enactment, No. 17, can solemnize a marriage. Any marriage celebrated in contravention to this is not deemed invalid, but the person who solemnizes it is liable to punishment.[95]

There are several obstacles to a marriage under Islamic law. A widow or divorcee may marry a man other than her former husband only after the expiration of the *'idda* period.[96] There are also certain prohibited degrees of marriage on the grounds of consanguinity, affinity or fosterage.[97] Islamic law also prohibits a man from marrying a woman whom he has divorced three times or with three talak unless she has been married to another person and divorced, after the consummation of that marriage. In order that a marriage may bear the character of a suitable union in Islamic law, the husband must be the equal of the wife in social status. This is the rule of *Kafā'a* or equality. The factors to be taken into consideration are birth, character, profession and absence of defects of the body.[98] The administration of Muslim law enactments of the states of West Malaysia pay due regard to the law of Islam and Malay custom as far as the obstacles to marriage are concerned.

Specific provisions have been made for the marriage of a *janda*.[99] Under the administration of Muslim law enactments, such person shall not be married to any person other than her husband, from whom she was last divorced, prior to the expiration of the period of 'idda, which shall be calculated in accordance with Islamic law. It is also enacted that she shall not be married unless she produces a certificate of death of her last husband, or a certificate of divorce lawfully issued under the law in force, or a certified copy of the entry relating to such divorce in the appropriate register of divorce, or a certificate granted by the Court of a Kathi to the effect that she is a janda. If her divorce was by three talak, a janda shall not be married to her previous husband unless she has been lawfully married to some other person, and such marriage has been consummated and later lawfully dissolved.[100] In Perak it is further provided that, in the case of a non-Muslim janda, she has to produce a letter stating that she has embraced the Muslim religion.[101] In Perlis the Kathi is given the power to annul the marriage should there be any collusion between the person whom an irrevocably divorced janda marries and her previous husband.[102] Such person is known in Malay as the *china buta*, that is, one who carries out the legal fiction of marrying a woman divorced from her husband by three talak for the expressed

purpose of divorcing her and, thereby, making it possible for her husband to remarry her. The enactments of the other states of West Malaysia do not provide any safeguards against the occurrence of such marriages. However, the law of Islam can be said to have been expressly enacted as regards the conditions to be fulfilled before the marriage of a janda could be solemnized.

A provision for the payment of the mas kahwin has been included in each of the Administration of Muslim Law Enactments of the states of West Malaysia. Originally mas kahwin meant money paid by the bridegroom to the bride's parents, but it is now, like the *mahr* of Islamic law, either paid to the bride herself or deferred and paid on divorce or on the death of the husband. The mas kahwin is ordinarily paid by the husband or his representative to the wife or her representative in the presence of the person solemnizing the marriage and at least two witnesses.[103] This is an express enactment of the law of Islam, for the mahr is an essential part of the marriage contract, so much so that even when it is unspecified at the time of marriage the wife is entitled to 'proportional' dower, that is, what a woman of her situation and position in life would normally receive.[104] A marriage in Islamic law must be effected before two witnesses who should be male, free, of irreproachable character and Muslim.[105]

Although the mahr in Islamic law may be anything that may legally be sold,[106] Malay custom has fixed this mahr or mas kahwin in the form of money.[107] It is only with the wife's consent that a husband may substitute articles for money. If articles are given they cannot be regarded as part of the mas kahwin in the absence of proof of such consent, and the burden of proof is on the husband.

Under the Shāfi'i school of law there is no fixed legal minimum for the mahr. However, under Malay adat the amount of the mas kahwin is fixed. The amount varies in each state of West Malaysia. and normally depends on the rank of the bride's father. In Negri Sembilan the traditional amount of the mas kahwin is 20 dollars. In Perak the amount varies with the status of the father of the bride, ranging from 50 dollars for the daughter of a commoner to 1,000 dollars for the daughter of the ruler. In Naning and Alor Gajah in Malacca the mas kahwin is fixed at 60 dollars for an unmarried woman and 40 dollars for a previously married woman.[108]

The amount of the mas kahwin is generally meagre. A deferred mas kahwin provides no restraint to divorce, as it is supposed to do, for the sum is easily payable, being so small. However, a groom may be asked to pay varying amounts depending upon the status, education and eligibility of the bride.

Besides the mas kahwin, the administration of Muslim law enactments also provide for the payment of the *hantaran, pemberian* and *belanja.* In Selangor, Penang, Perak, Perlis, Trengganu and Kelantan it is provided that the Registrar of Muslim Marriages shall ascertain and record the amount of mas kahwin and pemberian, and any part of the mas kahwin and pemberian, or both, which have been promised but not paid at the time of the solemnization of the marriage. The particulars of any security given for the payment of the mas kahwin or pemberian have also to be recorded.[109] Pemberian is defined in the Administration of Muslim Law Enactment of Selangor as 'the optional marriage settlement made by the husband on the wife at the time of the marriage in cash or in kind'. In Negri Sembilan, Malacca and Kedah the bridegroom has to pay, in addition to the mas kahwin, the pemberian and hantaran.[110] In these states pemberian means the marriage gift other than cash made by the husband to the wife at the time of the marriage. Hantaran, on the other hand, is the obligatory cash payment due, under local custom, to be paid by the husband to the wife at the solemnization of their marriage. In the state of Pahang the Registrar has to record the particulars of the belanja, in addition to the mas kahwin.[111] The belanja is the optional expense agreed by both parties. The pemberian, hantaran and belanja are all customary payments.

The registration of marriages is compulsory in all the states of West Malaysia. It is generally provided that marriages must be reported to the Registrar of the *mukim* or kariah. In Selangor and Perlis the person solemnizing the marriage must report it within seven days.[112] In Perak, Trengganu and Kelantan it is the duty of the parties to the marriage and the wali of the wife to report to the Registrar, also within seven days.[113] In Johore the duty of reporting a marriage falls upon the husband.[114] In the state of Pahang the parties to the marriage and the wali must report the marriage to the Registrar of the mukim within fifteen days.[115] In Malacca, Negri Sembilan, Penang and Kedah it is provided that the person solemnizing the marriage must report to the Registrar but the number of days is not specified.[116] Failure to report a marriage, divorce or revocation of divorce is made an offence under the enactments of all states.[117] Although the registration of marriages is compulsory, non-registration does not affect the validity of the marriage. Section 17 of the Muhammadan Marriage Enactment of Johore specifically states:

> Nothing in this Enactment shall be construed to render valid or invalid, merely by reason of its having been registered, any Muhammadan mar-

riage, divorce or revocation of divorce which would otherwise be invalid or valid.

It may be pointed out here that the Shari'a does not require that a marriage be registered. Marriage is a civil contract in Islamic law. Its requirements are simple: words of proposal (*ijāb*) and an acceptance *(qabūl)* must be expressed by the contracting parties or their representatives before the requisite number of witnesses, who must be two, sane and adult male Muslims.[118] The *Sunnah*[119] has also introduced the institution of the marriage feast which is designed as a means of publicity for the marriage.[120] The modern requirement that a marriage must be registered is, therefore, a modification introduced into the Shari'a based on European precedents.

In Pahang, Perak, Perlis, Trengganu and Kelantan it is provided that, in addition to the marriage certificate, the Registrar of Muslim Marriages shall also prepare a *surat ta'alik*, signed by him and both parties to the marriage, and deliver one copy to each party.[121] This surat ta'alik is a certificate of conditions attached to a marriage which, if broken, entitles the woman to the divorce known as *cherai ta'alik*. Any lawful condition may be included in the surat ta'alik but conditions, such as a stipulation that the husband cannot take another wife so long as the first marriage subsists, or that he is not liable to maintenance, have the effect of invalidating the stipulation, although the marriage remains intact.[122] The prescribed form of surat ta'alik in Trengganu is as follows:

> On every occasion that I am enstranged from my said wife for a continuous period of four months, whether I leave her or she leaves me by will or by force and upon application by her to the *Kadzi* or *Naib Kadzi* and upon satisfied by him [*sic*] of such enstrangement, my marriage to my said wife shall be dissolved by one *talak*.[123]

Although there are no specific provisions for the preparation of a surat ta'alik by the Registrar in the legislation of the other states of West Malaysia, it does not mean that the *ta'alik* is not recognized in these states. The surat ta'alik is not made compulsory but is encouraged. The Administration of Muslim Law Enactments of these states in fact make provision for the application of the divorce known as cherai ta'alik by a married woman.[124] The form of ta'alik prescribed in Selangor reads as follows:

> Every time that I fail to provide maintenance to my wife for a period of four months or more, she can make a complaint to the *Kathi's* Court, and if her complaint is proved, then she is divorced by one *talāk*, and

every time I revoke the divorce and my wife refuses to agree to it, she is divorced by one *talāk*.[125]

The prescribed form of ta'alik in Negri Sembilan, on the other hand, is as follows:

Every time that I leave my wife or I am abroad and it is not known whether I am alive or dead or I am away at a place where I am unable to cohabit with my wife for a period of four months or more and my wife complains to a *Kathi* and her complaint is proved then she is divorced by one *talāk*.[126]

The surat ta'alik is, perhaps, the most potent weapon in the hands of a Muslim wife to obtain her freedom from the husband through the breach of a valid condition.

As regards polygamy, in contrast with Singapore, there has been no serious attempt to control the practice in West Malaysia. In Selangor and Negri Sembilan a man is merely required to declare in the application form as to whether he is already married. If he is, further enquiries will be made.[127] This is rather vague. He is not, for example, required to obtain the consent of the Chief Kathi, or of his first wife, before he may be married again. Since 1960 Singapore has attempted to control polygamy by enacting that, where a person has already a wife living and wishes to marry again, he must obtain the consent of the Chief Kathi. The latter is then required to hold an enquiry in respect of the parties to satisfy himself that there is no lawful obstacle to the marriage according to Muslim law.[128] As a result of the strict control on the exercise of the privilege of polygamy, only three men were given permission to marry again in Singapore in 1961, six in 1962 and another six in 1963.[129]

The provisions as regards maintenance or *nafaqa* in the Administration of Muslim Law Enactments of the states of West Malaysia may be said to be an express enactment of the law of Islam. It is provided that a married woman may, by application in the Court of a Kathi obtain an order against her husband for the payment from time to time of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law.[130] Under the Shāfi'i school of law, maintenance is a debt and may be claimed from the time the husband fails to provide it.[131] Maintenance is incumbent on a husband, whether rich or poor, and regardless of whether the wife has the means to maintain herself. Nafaqa consists of food, clothing and accommodation. Nawawi included also toiletries, medicines, utensils for eating, drinking and preparing food, something to sit on, money for the usual customary bath and the special one prescribed after coition and *accouchement*, as well as necessary

servants, at least where the wife is of a social position which does not permit her to dispense with them. The husband's duty to maintain commences as soon as the wife places herself at his disposition or when the marriage is consummated. The proper scale of maintenance is calculated with reference to the husband's means. The wife's right to maintenance ceases only if she is *nushūz*, or disobedient, and on irrevocable divorce.[132]

According to the Administration of Muslim Law Enactments, an order for the payment of maintenance may be enforced by the court which makes the order, as in Negri Sembilan, Malacca, Penang and Kedah, or in a Magistrates' Court or the court of a Kathi Besar as in Selangor, Pahang, Perlis, Perak, Trengganu and Kelantan. Failure on the part of the husband to comply with the order makes him liable to imprisonment. It is also provided that any order for the payment of maintenance may be rescinded or varied upon application of any interested person and upon proof of change of material circumstances.[133] Although there is no provision as regards maintenance in the Muhammadan Marriage Enactment, No. 17, of Johore, applications for maintenance can be brought in the Shariah Courts which are given power to make orders for the payment of maintenance. The Married Women and Children (Enforcement of Maintenance) (Application to Shariah Courts) Enactment, 1968,[134] further specifies that the provisions of the Married Women and Children (Enforcement of Maintenance) Act, 1968,[135] are applicable to or in respect of maintenance orders made by the Shariah Courts in the state of Johore.[136]

It is also provided in the states of Selangor, Negri Sembilan, Malacca, Penang, Kedah, Perak, Trengganu and Kelantan that a woman who has been divorced may obtain an order from the Court of a Kathi against her former husband for the payment of maintenance during the period of 'idda if the divorce is by one or two talak or in respect of the period of her pregnancy.[137] This is in accordance with the law of Islam, for a woman is entitled to maintenance during the 'idda if she has been revocably repudiated. No maintenance is due to her if the divorce is irrevocable, that is, a divorce with three talak, unless she is pregnant. According to the Shāfi'i school, a woman's right to claim maintenance is also not subject to limitation, that is, her claim may be made even after the expiration of the 'idda period.[138]

In Pahang the payment of maintenance during the 'idda may be made in cash or kind.[139] In the state of Perlis, a divorced woman is allowed to claim maintenance not only during the period of her

legal retirement after divorce, but also for as long as she remains unmarried or does not commit any misconduct. It is provided that the Kathi shall, before making such order, satisfy himself that the woman has been divorced without good cause or reason.[140] This provision is in addition to that for the application of a consolatory gift or *matta'ah* by a divorced woman from her husband. Such application is made to the Kathi who, after hearing both parties, may order the payment of such sum as may be just.[141] The latter provision as regards matta'ah is also found in the administration of Muslim law enactments of all the other states of West Malaysia[142] except Johore. The provision for the payment of a consolatory gift may be said to be an express enactment of the law of Islam. It is enjoined in the Holy *Qur'an:*

> It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed unto them a portion. Provide for them, the rich according to his means, and the straitened according to his means, a fair provision. [This is] a bounden duty for those who do good.[143]

Furthermore, according to the Shāfi'i school of law, the consolatory gift is incumbent in the case of separation when the woman is not responsible for it, that is, when it is the husband who repudiates her.[144]

As regards divorce by talak, the Administration of Muslim Law Enactments of Selangor, Negri Sembilan, Malacca, Penang and Kedah merely provide that a husband shall report such divorce to the Registrar for the locality in which the divorce takes place within seven days. On the payment of the prescribed fee, the Registrar shall enter the particulars and nature of the divorce in the divorce register and issue certificates for such divorce to both parties, with the proviso that, if the divorce is revocable, no certificate shall be issued to the wife until after the expiration of the 'idda period.[145] However, in Selangor and Negri Sembilan administrative reforms were effected in 1962 and 1963 respectively which provide a form of restriction on the right claimed by Muslim husbands to divorce their wives. It is enacted that any person who wishes to obtain a divorce must apply in the prescribed form to the Court of a Kathi. The latter will then summon both parties and inquire into the matter, and only after the inquiry will the divorce be registered and become effective. It is expressly provided in Selangor that no divorce may take place except before the Kathi, and no divorce or pronouncement of divorce will be effective unless the wife agrees to the divorce and the Kathi has approved it.[146] In Perak it is enacted that a husband who desires to divorce his wife shall first submit an

application on a prescribed form to the Registrar of Muslim Marriages and Divorces. Upon receipt of the application, the Registrar shall, for the purpose of effecting a peaceful reconciliation, make enquiries in respect of the applicant and his wife as he thinks fit. If no reconciliation is effected between the parties, the Registrar then registers the divorce after the properties of the husband and wife have been acceptably returned to each respective party.[147] In Perlis it is expressly provided that a husband has to apply for permission if he wishes to divorce his wife. The Kathi who receives such an application makes inquiries with respect to both the husband and wife for the purpose of a peaceful reconciliation. He shall not grant permission for divorce unless he is convinced that no reconciliation is practicable. It is further enacted that whenever any misunderstanding arises from the decision of the Kathi, the latter shall have power to order both parties to appoint their representatives to find ways of solving the misunderstanding. The representatives are given power to receive compensation on behalf of the husband, and to receive the divorce on behalf of the wife. Should the representatives be unable to effect a settlement, the Kathi is given the further power to appoint two arbitrators or *hakam*, one to act on behalf of the husband and the other on behalf of the wife. The arbitrator on behalf of the husband is given power to declare a divorce. If the arbitrators are also unable to solve the misunderstanding, the Kathi shall refer the matter to the Majlis Ugama Islam dan Adat Istiadat Melayu. The decision of the Majlis shall be final.[148]

Therefore every effort is made in Perlis to effect an amicable reconciliation between husband and wife. The provision for the appointment of the hakam is in accordance with Islamic law. The settlement of marital disputes by arbitration is recommended in the Holy Qur'an.[149] The appointment of the hakam is also provided in the Administration of Muslim Law Enactments of Penang, Perak, Pahang, Kedah, Trengganu and Kelantan in the case of constant quarrels or serious disagreement between husband and wife.[150]

In Pahang, Trengganu and Kelantan the legislation of these states provides that a husband may divorce his wife in accordance with Islamic law. It is specified in Trengganu and Kelantan that the divorce may be with one, two or three talak. The husband is required to report the divorce to the Registrar within a week in Trengganu and Kelantan, and within fifteen days in Pahang. The Registrar has to make inquiries and satisfy himself that all the

requirements of Islamic law have been complied with before he can register the divorce and issue certificates of divorce to the respective parties.[151]

In Selangor, Negri Sembilan, Penang, Malacca, Kedah and Perlis the husband must report the revocation of a divorce within seven days to the Registrar who registered the divorce. The Registrar is required to make enquiries in order to satisfy himself that the divorce has been lawfully revoked before he can make a note of the revocation in the Register of Divorces and on the certificates of divorce.[152] According to administrative rules which have been issued in Negri Sembilan a reconciliation by a former husband shall be made within his former wife's period of 'idda in a prescribed form within seven days from the date of reconciliation. The form contains a declaration of the revocation of the divorce by the husband and the acceptance of the revocation by the wife.[153] A husband in Perak is also required to submit an application for the registration of revocation of divorce on a prescribed form to the Registrar who registered the divorce in the first instance. After being satisfied that the divorce has been lawfully revoked according to Muslim law, he shall make an entry in the Register of *Rujo'* and issue the certificate of rujo' or revocation of divorce.[154]

In Pahang, Kelantan and Trengganu revocable divorce is defined as 'divorce by one or two talak not followed by a lapse of time as to render it irrevocable'. 'Recohabit' is further defined in Trengganu as 'resume conjugal relations within the period before the divorce has become irrevocable'. It is provided that, if after a revocable divorce recohabitation takes place, the parties are required to report the fact to the Registrar within a week in Trengganu, and within fifteen days in Pahang. Only after making enquiries and being satisfied that recohabitation has lawfully taken place, shall the Registrar register such recohabitation by endorsing it on the counterfoil of the certificate of divorce and issue certificates of re-cohabitation to the parties. It is specified that if the divorce has taken place without the wife's knowledge the husband shall not require or request his wife to re-cohabit with him without first disclosing the fact of such divorce. In Pahang, whether the wife consents or not to the reconciliation, she may be ordered by the Kathi, on application by the husband, to resume conjugal relations unless she can show good cause in accordance with Islamic law to the contrary. On the other hand, in Trengganu and Kelantan, a wife may be ordered by the Kathi to resume conjugal relations with her husband only if she has consented to the revocation of the divorce.

If she does not consent to the revocation for reasons allowed in Islamic law, she cannot be ordered by the Kathi to re-cohabit with her husband. In fact, she is allowed to apply to the Kathi to request her husband to divorce her, and if he refuses to do so, the Kathi is given the power to appoint arbitrators or hakam. Furthermore, in Kelantan, a husband is required to seek his wife's consent before pronouncing a *rojok*. It is provided that a husband who fails to do so is guilty of an offence and is liable to a fine or imprisonment.[155]

The Administration of Muslim Law Enactments of all the states of West Malaysia, except Johore, make it an offence for any person who, having lawfully divorced his wife, resumes cohabitation with her without having pronounced a lawful rojok.[156] This is in accordance with the law of Islam because, under the Shāfi'i school of law, a return to conjugal union cannot be effected tacitly, as for example by sexual intercourse, but the person must declare in explicit terms that he takes his wife back.[157]

As can be seen, the talak divorce is clearly applicable in all the states of West Malaysia. However, there are other methods of divorce known to Islamic law. The ta'alik has already been mentioned: the other methods of divorce are *khul'*, *faskh*, *mubāra'a ilā'*, *zihār*, and *li'an*. The *talāq ta'alik* (*cherai ta'alik*), *khul'* (*khula* or *cherai tebus talak*), *faskh* (*fasah* or *pasah*) were all applicable in the Malay States and the Straits Settlements. Furthermore, the Moslem Marriage and Divorce Enactment, 1938, of Kelantan, expressly provided for the divorce by mutual consent or *mubār'a*.[158] However, there were no references, whether expressly or impliedly, to the kinds of divorce known as ilā',[159] zihār,[160] or li'an[161] in any of the legislation of the Malay States or the Straits Settlements. The current administration of Muslim law enactments of the states of West Malaysia also do not refer to these three methods of divorce. It can safely be presumed then that ilā', zihār and li'an are not applicable in West Malaysia.

Divorce by the ta'alik process, khul' and faskh are all methods of divorce at the instance of a wife. Cherai ta'alik and surat ta'alik have been discussed at length earlier in this chapter. It is a divorce by the breaking of a condition which is attached to the marriage.

The basis of khul' is provided by an injunction of the Holy Qur'an:

> Divorce must be pronounced twice and then [a woman] must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able

to keep within the limits (imposed by) Allah. And if ye fear they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For those who transgresseth Allah's limits: such are wrongdoers.[162]

The two essential conditions of khul' are common consent of the husband and wife, and some consideration passing from the wife to the husband for her release. The divorce is completed by the pronouncement of talak and operates as a single *talāq bā'in* or irrevocable divorce. The Penang case, *Rokiah* v. *Abu Bakar*,[163] established on appeal that a divorce by khula must be by consent of both parties: the consent of the husband cannot be dispensed with.

Faskh, or fasah, on the other hand, is the annulment of a marriage on the application of the wife. It may be defined as the dissolution or rescission of the contract of marriage by judicial decree. According to the Shāfi'i school of law, the grounds upon which a wife may obtain a faskh divorce are impotency, insanity, leprosy and elephantiasis. As for impotency, it must be proved that the husband was impotent at the time of marriage. A husband who becomes impotent after cohabitation with the wife can no longer be repudiated by her. A wife may also bring an action to avoid or repudiate a marriage where the husband is not equal in status (*kufū*) to her. Inability to provide maintenance on the part of a husband is another ground for a faskh divorce. The husband must, however, be in a state of complete insolvency, or his property is elsewhere at a distance so that he is unable to provide maintenance for his wife. The option to void or repudiate a marriage on any of the above grounds must be confirmed by the order of a court or a Kathi[164]

It is expressly provided in Selangor, Negri Sembilan and Malacca that any Kathi may receive from a married woman an application for the divorce known in Muslim law as fasah or for the divorce known as cherai ta'alik. In Kedah and Penang a woman who has been resident for not less than four months in the area may apply to the Kathi not only for a fasah divorce and a cherai ta'alik but also for *kholo* (khul'). On receipt of the application, the Kathi has to serve notice upon the husband. It is specified that, if the husband is not in the state, the notice shall be sent to his nearest relative. In Kedah and Penang it is further provided that, if the husband has no relatives, the notice may be advertised in a newspaper circulating in the state or dispensed with altogether. The statement of the wife is to be recorded by the Kathi at the hearing, together with those of at least two witnesses. The Kathi is required to satisfy himself

that the provisions of Muslim law have been complied with before making an order or decree for the dissolution of the marriage. An appeal against the order lies with the President of Majlis[165]

In Perlis the provision for the application of divorce by a wife is general in that it merely states that a married woman may apply to a Kathi for a divorce. It is, however, expressed that on receipt of an application by a wife for permission to divorce her husband, the Kathi must make enquiries in respect of both parties for the purpose of a peaceful reconciliation. The Kathi must not grant permission unless he is convinced that no reconciliation is practicable.[166]

It is specifically provided in Pahang that a woman may apply to a Kathi for divorce in accordance with the law of Islam. The Kathi is required to enquire into the application, and if the latter has been caused by a disagreement of an extreme nature between husband and wife, the Kathi shall appoint two arbitrators with powers to divorce the wife on behalf of the husband, and to apply for a divorce by redemption or cherai tebus talak (khul') on behalf of the wife. It is further provided that, if the husband does not agree to a divorce, but both parties agree to a divorce by redemption, the Kathi will assess the amount of payment to be made by the wife and ask the husband to pronounce the divorce by redemption and register it.[167]

In Perak, Trengganu and Kelantan it is enacted that, if the husband consents to his wife's application for divorce, the Kathi shall cause the husband to pronounce a divorce and register it. This appears to be a divorce by mutual consent or *mubāra'a*, for it is further provided that, if the husband does not agree to be divorced by consent, but the parties agree to a divorce by redemption or cherai tebus talak, the Kathi or Kathi Besar shall cause the husband to pronounce a divorce by redemption and register it, after the amount of payment to be made by the wife has been agreed upon by the parties. If the husband refuses to agree to a divorce by redemption, the Kathi may appoint arbitrators or hakam.[168]

A married woman in Pahang, Perak, Trengganu and Kelantan is also entitled to apply for a ta'alik divorce in pursuance of her surat ta'alik. The Kathi who receives such an application is required to make enquiries and if satisfied that the divorce is valid shall confirm and register it.[169] The enactments of these four states also enable a married woman to apply by suit in a Kathi's court for a decree of dissolution of her marriage, of fasah, in accordance with Muslim law. The Court will then serve a notice to her husband or his nearest relative. It is provided that the decree must be pronounced according to Islamic law. At least two witnesses are required to give

evidence on oath or affirmation, together with the woman, before the Kathi can register the fasah divorce.[170]

Although there are no statutory provisions as to cherai ta'alik, khul' or fasah in Johore the Kathi has jurisdiction to register these divorces in accordance with Muslim law; this law is part of the law of Johore[171] and, therefore, the Shāri'a applies in matters of marriage and divorce.

Before concluding this summary it may be pointed out that most of the Administration of Muslim Law Enactments contain provisions as regards the desertion of wives and the ill-treatment of wives by their husbands, as well as for the disobedience of wives towards their husbands. In Selangor, Negri Sembilan, Malacca, Penang, Trengganu, Perak and Kelantan, it is enacted that, if a person ceases to cohabit with his wife, as required by Muslim law, and if he fails or neglects to comply with an order of the court of a Kathi to resume cohabitation with her, he is liable to imprisonment or a fine, or to both.[172] A wife whose husband has deserted her can obtain an order from the Kathi's Court to compel him to return to the marital home. In Kedah the provision as regards desertion extends to both husband and wife. Both, if found guilty of the offence, are liable to be imprisoned or fined.[173] There are no statutory provisions as regards desertion in Pahang, Perlis, and Johore.

It is an offence for a husband in Selangor, Negri Sembilan, Malacca, Penang, Pahang, Perak, Trengganu and Kelantan to ill-treat his wife.[174] This provision is an express enactment of the law of Islam, for under the Shāfi'i school of law, a husband who ill-treats his wife should be admonished by the Court.[175] There are no statutory provisions as regards the ill-treatment of wives by husbands in Perlis and Johore.

The disobedience of wives to marital authority is termed nushūz in Islamic law. The Administration of Muslim Law Enactments of Selangor, Negri Sembilan, Malacca, Perak, Pahang, Trengganu and Kelantan make provisions for this. It is enacted that any woman who wilfully disobeys any order lawfully given by her husband in accordance with Muslim law is punishable with a fine. In the case of a second or subsequent offence she is liable to a simple imprisonment or to a fine. It is further provided, however, that it shall be a sufficient defence if her husband has been guilty on more than one occasion during the preceding year of abusing or ill-treating her.[176] No statutory provisions are made as regards the disobedience of wives in Penang, Kedah, Johore and Perlis.

It is clear from the preceding narrative that the law as regards marriage and divorce in West Malaysia is substantially that of the traditional Shari'a. The influence of adat can be seen in the provisions for the breach of the betrothal contract as well as for the payment of the mas kahwin and the customary payments of the hantaran, pemberian and belanja.[177] Both parties to a betrothal contract are entitled under the Administration of Muslim Law Enactments of the states of West Malaysia to claim damages for breach of promise to marry. It has been established through case law that proceedings for such damages may also be brought up to the High Courts of each state, and that a Muslim woman can validly sue an already married man for breach of promise to marry.

The Administration of Muslim Law Enactments of each state also do not specify a minimum age for marriage and it is only in Kelantan and Trengganu that it is expressly enacted that a marriage is void unless both parties to the marriage have consented to it. As for polygamy there is no serious attempt to control the practice. The administrative reforms in Selangor and Negri Sembilan are rather vague. A man is required to declare in a form whether he is already married, but he is not required to obtain the permission of the court or even his existing wife in order to enter into a second or subsequent marriage. As regards divorce, it is only in the state of Perlis that it is enacted that a man must apply for permission to divorce his wife. Furthermore, every effort is made to effect an amicable reconciliation between the parties involved. In Selangor, Negri Sembilan and Perak, there is some form of restriction on the husband's right of unilateral repudiation in that he must apply in a prescribed form to the Court of the Kathi or the Registrar if he desires to divorce his wife, and enquiries will be made as regards his application. In Selangor administrative rules further provide that no divorce can take place except before a Kathi and unless the wife consents to it. These efforts are commendable as they seek to protect the position of married women. It is unfortunate though that the hakam or arbitrators are not provided for in some states, as they constitute an invaluable means of conciliation.

The married women of West Malaysia are able to initiate divorce proceedings and apply for maintenance both during coverture and within the period of 'idda after divorce. In the state of Perlis women who are divorced through no fault of theirs are also able to apply for maintenance after the period of 'idda.

As regards registration, although it is compulsory in West Malaysia, there is no mention whether it affects the validity or otherwise

of the marriage, except in Johore. Lastly, although the courts of the Kathi and Kathi Besar are open, their records are not made available to the public and their proceedings are not reported. It is difficult, therefore, to know the actual practice of these courts.

The provisions in the administration of Muslim law enactments of the states of West Malaysia as regards property relate mainly to the jurisdiction of the Kathi and Kathi Besar to deal with the division of sepencharian (jointly acquired properties) property and the determination of persons entitled to share in the estate of a deceased Muslim, as well as the setting up of the fund known as *Bayt-ul-mal*. There are no express enactments of the Muslim law as regards property. In Penang and Malacca the provisions relating to property in the Muslims Ordinance, 1936 (Cap. 57 of the Straits Settlements) are still applicable to Muslims in the two states.[178] The Distribution Ordinance, 1958,[179] and the Wills Ordinance, 1959,[180] of West Malaysia do not apply to Muslims. The Probate and Administration Ordinance, 1959,[181] applies to both Muslims and non-Muslims, that is, as regards the application for and grant of probate of wills and letters of administration of the estate of a deceased person and the powers of executors and administrators. The distribution of the small estates of deceased persons is governed by the Small Estates (Distribution) Ordinance, 1955 (no. 34 of 1955).

So far as inheritance of property is concerned, the position in West Malaysia is similar to that in the former Federated Malay States and the Unfederated Malay States, in that it is governed by Muslim law, subject to the special rights of spouses. In addition, it is subject to adat in varying degrees.

The Courts of the Kathi Besar and Kathi in Selangor, Pahang, Perak, Perlis, Trengganu and Kelantan are given jurisdiction to determine the persons entitled to share in the estate of a deceased Muslim and the shares to which such persons are entitled.[182] Furthermore, it is provided in Selangor, Negri Sembilan, Malacca, Penang, Pahang, Kedah and Trengganu that in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority may request the court of a Kathi Besar or a Kathi to certify its opinion as to the persons entitled to share in the estate and as to the shares to which they are respectively entitled.[183]

According to Islamic law the grounds of legitimate succession are relationship or kinship, marriage, patronage and religion. In default of heirs of the first three kinds, the inheritance passes to the general body of Muslims as represented by the Bayt-ul-mal. The

Administration of Muslim Law Enactments of the states of West Malaysia provide for the establishment of a fund known as the Bayt-ul-mal[184] or the General Endowment Fund[185] which is made up of money and property to which there are no heirs and contributions by persons to the fund.

The persons entitled to share in an intestate's estate on the ground of blood relationship in Islamic law are the Sharers or Koranic heirs, the agnates or residuaries and the cognates or uterine relations. The sharers are twelve in number: they are the father, grandfather, the uterine brothers, the husband, the widow, daughter, daughter of a son or lineal male descendant, mother, grandmother, consanguine sister (that is, half-sister on the father's side) and uterine sisters (that is, half-sister on the mother's side). The shares are specified in the Holy Qur'an. They are entitled to their specified portions, and if these exhaust the estate, the agnates take nothing. It is only when a residue is left that the agnates take the residue. If there are no agnates, the residue reverts to the sharers in proportion to their shares, except in the case of the husband or the wife. It is only where there are neither sharers nor agnates that the estate is divided among the cognates or uterine relations. The husband or widow, father, mother, son and daughter are never excluded from succession. There is no succession between a Muslim and a non-Muslim and an apostate cannot inherit or be inherited from. *Re Timah binti Abdullah, decd.* [186] established that the latter rule is applicable in Pahang. In Penang and Malacca, however, section 27 of the Muslims Ordinance (Cap. 57 of the Laws of the Straits Settlements, 1936) is still applicable: a next of kin who is not a Muslim is entitled to share in the distribution as though he were a Muslim.

Some general rules of succession are: the nearer relative excludes the more remote from succession (that is, a child excludes a grandchild, a father excludes a grandfather); sons get twice as much as daughters; the widower gets half the estate when there are no children or agnates, otherwise he gets one-fourth; the widow gets one-fourth where there are no children or agnates, otherwise she gets one-eighth.[187]

One-eighth of the estate does not provide the widow with adequate subsistence. In West Malaysia the matter is regulated by Malay custom: the rule of harta sepencharian enables a widow to obtain a one-third or a one-half share of all property which has been acquired through joint resources or efforts by the spouses during coverture. This special share is in addition to the one-fourth or one-eighth share which the widow is entitled to under Islamic law.[188]

Testamentary power, according to Islamic law, is limited to one-third of the estate. It has been pointed out earlier that the case *Shaik Abdul Latiff* v. *Shaik Elias Bux*[189] upheld this rule of Muslim law. This testamentary power may not be used to favour one heir above another or to elude the rules of intestate succession. A will contrary to this principle is only valid when the heirs approve of the disposition, thus waiving their legal rights.[190] Actions can be heard in both the civil and Kathi's courts except in Kedah, Penang, Malacca and Negri Sembilan where only the civil courts have jurisdiction. Similarly, the earlier law on wakaf is retained and actions can be heard in both civil and religious courts. The validity of any wakaf or nazr is decided by principles of Islamic law but this general proposition is subject to the forum in which an action is commenced. The civil courts may very well determine this question upon prior precedent including Indian and East African precedent. On the other hand, an individual may be estopped from challenging the validity of a wakaf if he had agreed to abide by the decision of a *Mufti*.[191]

The distribution of the small estates of deceased persons, as has been mentioned earlier, is provided for in the Small Estates (Distribution) Ordinance, 1955. For the purpose of this Ordinance, a small estate in West Malaysia is an estate of a deceased person consisting wholly or partly of immovable property which does not exceed 25,000 dollars in total value.[192] The Collector, that is, the principal land officer appointed for a district, is given exclusive jurisdiction to deal with the distribution and administration of small estates.[193] It is specifically provided that the Collector must ascertain the law applicable to the devolution of the estate of the deceased and shall decide who, in accordance with such law, are the beneficiaries and the proportions of their respective shares and interests.[194] When the Collector is satisfied that all the beneficiaries of the estate, being of full age and capacity, have agreed between themselves as to the manner in which the estate should be distributed, he may distribute the estate according to the agreement, unless it appears to him to be unjust or inequitable. The Collector is given the power to assent to such agreement on behalf of any beneficiary who is a minor or a person not of full capacity.[195] However, if such person is a Muslim, his guardian has to assent on his behalf.[196]

The operation of this section of the Small Estates (Distribution) Ordinance, 1955, can be seen in the case of *Re Mamat bin Dat San & Anor; Mek Som* v. *Awang bin Senik*.[197] The plaintiffs in the case applied to the court for a declaration that the order of distribution

of the estate of Mamat bin Dat San, deceased, made by the Collector of Land Revenue of Pasir Mas, Kelantan, was null and void. It was alleged that a share in the estate was given to a non-beneficiary, Awang bin Senik. It appeared that all the beneficiaries had consented to the order of distribution, and the consent of one of the beneficiaries who was of unsound mind had been given by his guardian appointed by the Collector. The Federal Court of Appeal held that the order of distribution was binding on the beneficiaries as it had been made with their consent. The appeal was thereby dismissed.

The Small Estates (Distribution) Ordinance, 1955, also empowers the Collector to exercise his discretion in distributing any small estate in order to prevent any excessive subdivision of the estate.[198] It is also provided that the Collector may refer for decision any question relating to Muslim law and Malay custom to the Ruler in Council of the state in which his district is situated, or to such other person or body of persons as the Ruler in Council may direct.[199]

As far as the separate property of married women is concerned, the married women of West Malaysia are governed by the provisions of the Married Women Ordinance, 1957.[200] The Married Women Ordinance, 1957, has effect in the Malay states in relation to Muslim married women, subject to the provisions of Muslim law and the customs of the Malays governing the relations between husband and wife.[201] According to Islamic law a married woman retains her property and any wages and earnings acquired by her. She is also entitled to sue and is liable to be sued in her own name in respect of her property and any contract made by her. Under Malay adat, too, a married woman can hold separate property.

Section 4 of the Married Women Ordinance, 1957, provides that a married woman shall —

(a) be capable of acquiring, holding and disposing of, any property;
(b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation;
(c) be capable of suing and being sued in her own name either in tort or in contract or otherwise and shall be entitled to all remedies and redress for all purposes; and
(d) be subject to the law relating to bankruptcy[202] and to the enforcement of judgments and orders in all respect as if she were a *feme sole.*

Furthermore, a woman has, in her own name against her husband, the same remedies and redress for the protection and security of her property, as if she were a *feme sole.* A wife is, however, not entitled to sue her husband for a tort.[203] Criminal proceedings concerning property also cannot be taken by a wife against her

husband, either while they are living together, or while they are living apart, concerning any act done while living together, unless such property has been taken by the husband when leaving or deserting or about to leave or desert his wife.[204]

The property rights of Muslim married women are thus statutorily provided for. All property belonging to her continues after her marriage to be her own separate property.

Limitations on Islamic Law

It may be useful at this stage to sketch some of the limitations upon Islamic law mentioned in the introduction to this chapter. Apart from the state legislation, which has already been described, and the Malay adats which are the subject of the next chapter, the present constraints upon Islam are the creation of the courts. The constraints as such are not directed against the substance of Islamic law in any way but arise out of jurisdictional issues involving the secular and religious courts. Each state enactment providing for the administration of Islamic law contains a section or sections providing that in the event of a conflict between the Kathi's court and the civil court the latter has overriding jurisdiction. However, the acts themselves do not make clear the jurisdictional boundaries between the Islamic and civil courts. For example, the Trengganu Administration of Islamic law Enactment[205] provides that in the event of a conflict between the Kathi's court and the civil court the latter shall prevail but this is qualified in that the civil court must be 'acting within its jurisdiction'. The essential question is, who decides this? The problem was first discussed in these terms in *Omar* v. *Public Prosecutor*.[206] The point at issue here was whether a certain section of the Kedah Shar'iyah Courts Enactment was valid in the light of the provisions of the Courts Ordinance of 1948. The question was decided by subjecting the provisions of the former enactment to the test of repugnancy against the civil law provisions.

More recent authority reinforces the validity of this decision. In *Nafsiah* v. *Abdul Majid*,[207] a Malacca case, the court in relying upon section 4 of the Courts of Judicature Act 1964, expressly stated the superiority of its own jurisdiction. This was an action in damages for breach of promise to marry where both parties were Muslim. It was contended that the Malacca Administration of Muslim Law Enactment, 1959, section 40(3)(b), excluded any court other than the Court of the Kathi Besar from jurisdiction. The High Court refused to accept this on the ground that the jurisdiction of the High Court cannot be limited in view of the Courts of Judicature Act of 1964.

Another case, also tending to support the jurisdiction of the secular courts, is *Haji Ariffin* v. *Govt. of Pahang*[208] where the position of a Kathi in government service was discussed in terms applicable to *any* government servant, including an analysis of the terms of the Constitution providing for dismissal (Art. 135(2)). Finally, in *Myriam* v. *Mohamed Ariff*[209] the court allowed an application for custody despite a prior consent order recorded by a Kathi.[210] This was allowed specifically on the basis of section 46 (5) of the Selangor Administration of Muslim Law Enactment which provided for the jurisdiction of the civil court.

Islamic Law in East Malaysia

East Malaysia comprises the states of Sabah and Sarawak. In addition the British protected State of Brunei possesses with these two states a common heritage of Islamic law.[211] All three territories also share the common law of England, the doctrines of equity and English statutes of general application.[212] These laws are subject to limitations imposed by local circumstance and native custom. In each state, therefore, Islamic law has always been considered and remains a viable system of personal law. Brunei has enacted a Religious Council and Kathi's Courts Enactment[213] which follows closely the West Malaysia legislation already considered in this chapter. In the other two states there is a variety of legislation[214] touching upon Islamic law. With the exception of the *Undang-undang Mahkamah Melayu Sarawak*[215] this legislation does not declare principles of law but makes specific provision for Muslims on various aspects of law. For example, the Sabah Marriage Ordinance of 1959 requires the person solemnizing the marriage and the witnesses to ascertain and record that the parties have consented. In both Sabah and Sarawak the respective Guardianship of Infants Ordinances apply to Muslims and in both cases the welfare of the child is paramount.[216]

The treatment of Islamic law in Sabah and Sarawak has not been consistent as between the respective legislatures both of which have altered or limited Islamic law in various ways. A striking example of the latter is in the field of adoption. In Sarawak the Adoption Ordinance[217] applies to Muslims and provides for the compulsory registration of adoptions made by Muslims. It is further provided that the adopted child stands in the same relation to the adopting parent as a legitimate child in respect of the estate of the adopting parents. The natural parents cease to have any right at all and the child has no claim by inheritance on the property of his natural

parents. The ordinance also provides that the District Officer must draw to the attention of Muslim adopting parents, before registering the adoption, that the adoption of children on this basis is contrary to Islamic law.

The position is the same in Sabah under the Adoption Ordinance of 1960 but prior to this ordinance the question of adoption was governed by the Civil Law Ordinance of 1938,[218] section 7 of which provided that an adopted child is to be treated as a legitimate child for all purposes. So far as inheritance is concerned, it was held in *Matusin bin Simbi* v. *Kawang binti Abdullah*[219] that Islamic law governs the inheritance of a deceased Muslim estate but, where there is an adopted child, this law is subject to section 7 of the Civil Law Ordinance under which an adopted child may succeed.

In Brunei a deceased Muslim estate is to be distributed in accordance with the Muslim law as practised in that state,[220] and in Sabah[221] and Sarawak[222] similar provisions apply. In both states difficulties have arisen as to what the Islamic law consists of in the matter of inheritance. There is apparently no clear dividing line, at least so far as the courts are concerned, between Islam and adat in inheritance. This is in contrast to the position in West Malaysia. Instead there is an intermingling of rules in Sabah and Sarawak leading to the courts considering bodies of law such as 'Melanau Islam custom'.[223] The most outstanding example of such a composite body of law is to be found in *Men binti Lockman* v. *Dan bin Dol*[224] where the court was concerned with intestate succession 'under Malay law and custom (*Hukum shara*) varied by local custom (*pencharian*)'. In the event, distribution was awarded on the basis of the Quranic shares with some adjustment for harta sepencharian (see Chapter 3). Apparently what happened was that non-pencharian property was distributed according to Islamic rules, and after the heirs to pencharian had been identified and settled the shares as between them were also distributed according to Islamic rules.

In Sarawak special provision has been made regarding the property of Muslim converts. Under Islamic law a non-Muslim cannot inherit from a Muslim and the Muslim Converts (Property) Ordinance[225] is designed to deal with this situation. Information on the conversion must be given to the District Officer who may refer the question of what provision should be made for non-Muslim beneficiaries to the District Court. The court may order a Muslim convert to make a fair and equitable provision for non-Muslim beneficiaries. The court may refuse an order if it seems that the exercise of its jurisdiction would result in a greater hardship than if

Islamic law were to apply. Where there has been no order by the District Court to make provision for beneficiaries, the law applicable to the distribution of the deceased's estate will be that had there been no conversion. The convert is deemed to have died intestate and distribution is therefore not complicated by purported legacies. The ordinance, in setting out these principles, is clearly reserving to the secular authorities the determination of the effects of a change of religion. The legislature in Sarawak has gone much further in this respect than in other states of Malaysia.[226]

The law relating to testamentary disposition in Sarawak is also quite different from that in West Malaysia.[227] It is governed by the Muslims Wills Ordinance,[228] the major provision of which is that the division of property made by will under this ordinance need not necessarily be regulated by Islamic law. The distribution may be in accordance with the desires of the testator. However, the ordinance also requires that a will be witnessed by two Native Chiefs and by a Senior Government Officer who may advise alterations in the bequests. If the testator does not agree to such alterations registration of the will may be refused. It will be clear that those provisions allow a freedom of testamentary disposition to Muslims sufficient for them to avoid Islamic obligations in favour of some local adat. An example of this is provided in *Sheripah Unei* v. *Mas Poeti*[229] where a will made by a Muslim bequeathing property to an adopted daughter was held valid on the ground that by section 3(2) of the Adoption Ordinance an adopted child stood in the same relation as a natural child. It was further held that adoption gives rise to rights of succession under Sarawak Malay adat (see Chapter 3). The law relating to Muslim wills was raised again three years later in *Abang Haji Zaini* v. *Abang Haji Abdulrahim*.[230] The question here was the validity of a will executed by a Muslim in accordance with English law but disposing of property in accordance with Islamic rules. This was held to be valid and the phrase 'Mohammedan law of inheritance' in the ordinance was defined as Muslim law as adopted in the colony and modified by local adat and/or local ordinance. Further, the court took the view, as in *Sheripah's* case, that the use of the form of will provided in the Muslims Wills Ordinance is not mandatory for Muslims. The judge also raised but did not answer the question — to what extent may a Muslim depart from Islamic law by executing a will in English form? This question remains undecided at the present time.

These cases and the provisions of the ordinances described above make it clear that Islamic law in Sabah and Sarawak, particularly

the latter, is subject to extensive amendment both by ordinance and by local adat. Leaving aside adat for the time being (see the next chapter) it is clear that the legislation on Islamic law proceeds not by way of supporting Islamic principle but by allowing extensive modifications at the initiative of the individual. At the same time the legislation does require that persons of certain race are bound by specified laws despite changes of domicile and way of life. This is illustrated in *Matusin bin Simbi* v. *Kawang binti Abdullah*[231] which was concerned with the distribution of the estate of a deceased Muslim Malay who originated from Brunei. He and his wife had lived for forty years with the Bajau people of North Borneo and had adopted two children. It was held, specifically under statutory authority,[232] that the 'racial' law applicable to the deceased must be Islamic law — the fact that he had lived with the Bajau for forty years could not be allowed to affect the racial determination of his law. However, this law was applied subject to statute[233] and distribution made to the adopted children.

It should be emphasized that although Islam has been separated from adat in this description such a distinction cannot really be maintained in practice. This is true also so far as Islam in West Malaysia is concerned. The next chapter deals with adat in more detail.

1. The majority of Muslims in Malaysia are Shāfi'i; amongst the North Indian and Pakistani Muslims are a number of adherents of the Hanafi-school. The standard text used in Malaysia for Shāfi'i Muslims is the *Minhaj-et-Talibin* of Nawawi.
2. *Hawah* v. *Daud* (1865) W.O.C. 26, Leic. 253.
3. (1878) 1 Ky. 421.
4. See also *Syed Abdullah Al-Shatiri* v. *Shariffa Salmah* [1959] M.L.J. 137.
5. *Shaik Madar* v. *Jaharrah* (1874) 1 Ky. 385.
6. *Adoomeh Kakah* v. *Lebby Dain* (1878) 1 Ky. 438.
7. No. 5/1880.
8. cf. Braddell, 1915: 91.
9. Mahomedan Marriage (Amendment) Ordinances, 1894, 1902, 1908, 1909, 1917.
10. (1908) 10 S.S.L.R. 72.
11. [1935] M.L.J. 147.
12. *Syed Mohamed Yassin* v. *Syed Abdul Rahman* (1921) 15 S.S.L.R. 199.
13. Taylor, 1948: 10.
14. A similar position was reached in *Syed Ahmad* v. *Fatimah*, Taylor 1948:14.
15. (1835) 2 Ky. Ecc. Rs. 8.
16. cf. *R.* v. *Willans* (1858) 3. Ky. 16.
17. *Hawah* v. *Daud* (1865) W.O.C. 26, (1877) Leic. 253, *Haleemah* v. *Bradford* Leic. 383.

18. cf. *Chulas* v. *Kolson* (1867) W.O.C. 30, *Kader Mydin* v. *Shatomah* (1868) W.O.C. 30, Leic. 260, *Fatimah* v. *Armootah Pillay* (1887) 4 Ky. 225.

19. *Nurud-Din* v. *Siti Aminah* [1929] S.S.L.R. 146 reversing the decision in *R.* v. *Ojir & Anor.* (1886) 4 Ky. 122 and declaring S.10 (3) of the Married Women's Property Ordinance 1902 inapplicable.

20. *Jamaludin* v. *Hajee Abdullah* (1881) 1 Ky. 503.

21. 22 & 23 Car. II c. 10.

22. Section 27, Mahomedans Ordinance No. 26/1923.

23. Nawawi: 246.

24. (1890) 4 Ky. 124, Taylor 1937: 15, Hooker 1972: 228–9.

25. This is not surprising because the ordinance is concerned with Islam and not Malay adat.

26. Perak, Selangor, Pahang and Negri Sembilan.

27. Perak — Registration of Muhammadan Marriages and Divorces Enactment 1885; Selangor, Pahang and Negri Sembilan — Muhammadan Marriage and Divorce Registration Enactment 1900.

28. (1922) 2 F.M.S.L.R. 61. This is a Perak case.

29. See *Public Prosecutor* v. *Khadijah binti Mat Siak* [1933] F.M.S.L.R. 14 on this point.

30. Cap. 198, revised laws of the F.M.S. 1935.

31. See below Chapter 3.

32. Ibid.

33. *Shaikh Abdul Latiff* v. *Shaik Elias Bux* (1922) 1 F.M.S.L.R. 204.

34. (1922) 1 F.M.S.L.R. 352.

35. Nawawi: 260.

36. [1940] M.L.J. 98, [1939] F.M.S.L.R. 230.

37. *Official Administrator* v. *Magari Mohihiko* [1940] F.M.S.L.R. 170, *Timah bt. Abdullah decd.* [1941] M.L.J. 44.

38. Section 27 Mahomedans Ordinance No. 26/ 1923.

39. Section 2 Muhammadan Law and Malay Custom (Determination) Enactment 1930, later cap. 196 revised laws of the F.M.S.

40. *Re Abdul Guny Abdullasa* [1936] M.L.J. 174.

41. *Re Alsagoff Trusts* [1956] M.L.J. 244.

42. cf. Then 1969–70: 228–9 for a review of the cases especially the comments on *Fatimah* v. *Logan* (1871) 1 Ky. 259 and *Ashabee* v. *Mohamed Kassim* (1887) 4 Ky. 212.

43. *Re Syed Shaik Alkaff* (1958) 2 M.C. 38. See also Newark (1946) and Sheridan (1957) on this point.

44. (1911) 12 S.S.L.R. 74.

45. *Re Shaikh Salman* [1953] M.L.J. 200 relying upon *Re Scarisbrick* [1951] Ch. 622.

46. See *Re Syed Shaik Alkaff* (1923) 2 M.C. 38 for an analysis of wakaf by the Court of Appeal of the Straits Settlements.

47. *Re Haji Daeing Tahira* [1948] M.L.J. 62. *Re Alsagoff's Trusts* [1956] M.L.J. 244.

48. *Re Alsagoff's Trusts* [1956] M.L.J. 244.

49. See Ahmad Ibrahim, 1971: 172–5. See also Johore Wakaf Enactment No. 11/1973.

50. See Maxwell & Gibson, 1924: 104, 110, 113–14, 136.

51. In Johore the original Muhammadan Marriage Enactment of 1914 as amended by 11/1935 and 2/1950 is still in force.

52. *Fatimah binti Harris* v. *Haji Ismail bin Tamin* (1939) 2 J.L.R. 67.

53. Federal Constitution, Malaysia, Ninth Schedule, List II.

54. No. 3 of 1952. Amended by Enactments 4 of 1960, 7 of 1961 and 8 of 1962.

55. No. 4. of 1955. Amended by Enactment No. 2 of 1964.

56. No. 5 of 1956. Amended by Enactments 2 of 1960, 14 of 1960 and 12 of 1963.

57. No. 1 of 1959.
58. No. 3 of 1959.
59. No. 15 of 1960.
60. No. 9 of 1962. Amended by Enactments 1 of 1963 and 8 of 1965.
61. No. 3 of 1964.
62. No. 11 of 1965.
63. Nos. 1 & 2 of 1966. These enactments repealed the Council of Religion and Malay Custom and Kathis Courts Enactment, No. 1 of 1953.
64. Enactment No. 17. Amended by Enactments 11 of 1935 and 2 of 1950.
65. No. 23/1965.
66. A jurisconsult, qualified to issue *fatwa* (legal opinion).
67. Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 4–38; Selangor Administration of Muslim Law Enactment, 1952, ss. 5–42; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 5–34; Johore Council of Religion Enactment, 1949, s.2; Kedah Administration of Muslim Law Enactment, 1962, ss. 4–38. Perlis Administration of Muslim Law Enactment, 1964, ss. 4–6; Trengganu Administration of Islamic Law Enactment, 1955, ss. 5–21; Penang Administration of Muslim Law Enactment, 1959, ss. 4–37; Malacca Administration of Muslim Law Enactment, 1959, ss. 4–37; Perak Administration of Muslim Law Enactment, 1965, s. 5; Kelantan Council of Religion and Malay Custom Enactment, 1966, s. 4 (i).
68. The Muslim law relating to the guardianship and custody of children is subject to several pieces of legislation which affect the application of Islamic principles in a variety of ways. So far as legitimacy is concerned, section 112 of the Evidence Ordinance overrides the Islamic rule; the section provides that where a child is born within a period of 280 days from dissolution of marriage this shall be conclusive proof that he is the legitimate son of the former husband unless lack of access can be shewn. In *Ainan* v. *Syed Abu Bakar* [1939] M.L.J. 209 it was held, following Indian authority, that the Evidence Enactment is a statute of general application and in questions of legitimacy it will exclude the rules of Islamic law.

So far as guardianship is concerned, the Guardianship of Infants Act No. 13/1961 of West Malaysia provides that nothing in the act which is contrary to the Muslim religion shall apply to any person under the age of eighteen whose religion is Islam. The act has been adopted in all the states of West Malaysia and it is provided that the court, in exercising its powers under the act, shall have regard primarily to the welfare of the infant. In *Mohamed* v. *Aminah* [1951] 1 M.L.J. 146, a Selangor case which looked at the question of welfare, it was said that the question of guardianship of a child must depend upon considerations of what is best for the child as a Muslim child. However, despite the act's disclaimer of jurisdiction in Muslim affairs, the courts have introduced it into questions of custody. In *Myriam* v. *Mohamed Ariff* [1971] 1 M.L.J. 265 the mother of two infant children, a boy aged three and a girl aged eight, applied for their custody. The applicant had been divorced by the respondent who was the father; at the time of the divorce the *Kathi* had recorded a consent order giving custody to the respondent. It was contended that the act was inapplicable as the infants were Muslim but it was held that sections 5 and 11 of the act were applicable because these provisions were in no way contrary to the Muslim religion. It was said further that the primary consideration of *Islamic* law, as well as English law, is the welfare of the child. In the event, custody of the girl was given to the respondent and custody of the boy to the applicant.
69. Selangor Administration of Muslim Law Enactment, 1952, ss. 43–46; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 39–43; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 35–39A; Kedah Administration of Muslim Law Enactment, 1962, ss. 39–43;

Perlis Administration of Muslim Law Enactment, 1964, ss. 11–14; Malacca Administration of Muslim Law Enactment, 1959, ss. 38–42; Penang Administration of Muslim Law Enactment, 1959, ss. 38–42; Johore Courts Enactment, No. 54, ss. 65–67; Trengganu Administration of Islamic Law Enactment, 1955, ss. 22–26; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 9; Perak Administration of Muslim Law Enactment, 1965, s. 45.

70. Ahmad Ibrahim, 1965; 173.

71. Nawawi: 282.

72. *Hantaran* means the obligatory cash payment due to be paid under local custom by the bridegroom to the bride at the time the marriage is solemnized.

73. Selangor Administration of Muslim Law Enactment, 1952, s. 124; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 119; Kedah Administration of Muslim Law Enactment, 1962, s. 119; Malacca Administration of Muslim Law Enactment, 1959, s. 118; Penang Administration of Muslim Law Enactment, 1959, s. 119; Perlis Administration of Muslim Law Enactment, 1964, s. 88; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 117; Trengganu Administration of Islamic Law Enactment, 1955, s. 95; Perak Administration of Muslim Law Enactment, 1965, s. 119; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 60.

74. [1969] 2 M.L.J. 174.

75. By virtue of section 4, the Court of Judicature Act, 1964, prevails over any other written law other than Constitution.

76. In Islamic law, a minor is a person who has not attained the age of puberty. In default of evidence as to puberty, a minor of either sex is considered adult on reaching the age of fifteen. See Ahmad Ibrahim, 1965: 181. In Malaysia, however, the Age of Majority Act, 1971, provides that a Muslim male or female is considered to have reached majority on attaining the age of eighteen.

77. Nawawi: 284.

78. Trengganu Administration of Islamic Law Enactment, 1955, s. 98; Kelantan Council of Religion and Malay Custom and Kathis Court Enactment, 1953, s. 140. The latter provision was re-enacted as s. 63 in the Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966.

79. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 120.

80. Administrative Rules issued by the Religious Department, Selangor, 1962; Negri Sembilan Marriage, Divorce and Reconciliation (Rujo') Rules, 1963; Perlis Administration of Muslim Law Enactment, 1964, s. 85.

81. Nawawi: 284.

82. Ibid: 285.

83. Perlis Administration of Muslim Law Enactment, 1964, s. 85 (3); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 120 (b); Trengganu Administration of Islamic Law Enactment, 1955, s. 98 (b); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 63.

84. *Kariah* or *kariah masjid* means the prescribed mosque area or mosque district.

85. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 116 (4).

86. Malacca Administration of Muslim Law Enactment, 1959, s. 115 (4); Penang Administration of Muslim Law Enactment, 1959, s. 115 (4); Kedah Administration of Muslim Law Enactment, 1962, s. 116 (4).

87. Selangor Administration of Muslim Law Enactment, 1952, s. 121 (4).

88. Perak Administration of Muslim Law Enactment, 1965, s. 120 (4).

89. Nawawi: 285–7.

90. Selangor Administration of Muslim Law Enactment, 1952, s. 121 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 116 (1); Perak Administration of Muslim Law Enactment, 1965, s. 120 (1); Pahang

Administration of the Religion of the Law of Islam Enactment, 1956, s. 118 (1); Malacca Administration of Muslim Law Enactment, 1959, s. 115 (1); Penang Administration of Muslim Law Enactment, 1959, s. 116 (1); Kedah Administration of Muslim Law Enactment, 1962, s. 116 (1); Perlis Administration of Muslim Law Enactment, 1964, s. 83; Trengganu Administration of Islamic Law Enactment, 1959, s. 96 (1); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 61 (1).

91. *Imam* is a prayer-leader. It also means the founder or leading jurist of different schools of law.

92. Selangor Administration of Muslim Law Enactment, 1952, s. 121 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 116 (1); Perak Administration of Muslim Law Enactment, 1965, s. 120 (2); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 118 (2); Malacca Administration of Muslim Law Enactment, 1959, s. 115 (1); Penang Administration of Muslim Law Enactment 1959, s. 116 (1); Kedah Administration of Muslim Law Enactment, 1962, s. 116 (1); Perlis Administration of Muslim Law Enactment, 1964, s. 84 (1); Trengganu Administration of Islamic Law Enactment, 1955, s. 96 (2); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 61 (2).

93. Selangor Administration of Muslim Law Enactment, 1952, s. 121 (3); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 116 (3); Perak Administration of Muslim Law Enactment, 1965, s. 120 (3); Malacca Administration of Muslim Law Enactment, 1959, s. 115 (3); Penang Administration of Muslim Law Enactment, 1959, s. 116 (3); Kedah Administration of Muslim Law Enactment, 1962, s. 116 (3); Perlis Administration of Muslim Law Enactment, 1964, s. 85 (b).

94. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 119; Trengganu Administration of Islamic Law Enactment, 1955, s. 97; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 62.

95. Johore Muhammadan Marriage Enactment, No. 17, s. 6 (ii).

96. Nawawi: 365 et seq.

97. ibid: 291 et seq.

98. ibid: 288–9.

99. *Janda* is a female who is not a virgin, or one who has been married and whose marriage has been terminated either by divorce or on the death of her husband.

100. Selangor Administration of Muslim Law Enactment, 1952, s. 122; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 117; Malacca Administration of Muslim Law Enactment, 1959, s. 116; Penang Administration of Muslim Law Enactment, 1959, s. 117; Kedah Administration of Muslim Law Enactment, 1962, s. 117; Perak Administration of Muslim Law Enactment, 1965, s. 120 (5); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 121; Perlis Administration of Muslim Law Enactment, 1964, s. 86; Trengganu Administration of Islamic Law Enactment, 1955, s. 99; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 64.

101. Perak Administration of Muslim Law Enactment, 1965, s. 120 (5) (b) (v).

102. Perlis Administration of Muslim Law Enactment, 1964, s. 86 (2).

103. Selangor Administration of Muslim Law Enactment, 1952, s. 125 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 120 (1); Malacca Administration of Muslim Law Enactment, 1959, s. 119 (1); Penang Administration of Muslim Law Enactment, 1959, s. 120 (1); Kedah Administration of Muslim Law Enactment 1962, s. 120 (1); Perak Administration of Muslim Law Enactment, 1965, s. 123; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 123 (1); Perlis Administration of Muslim

Law Enactment, 1964, s. 89; Trengganu Administration of Islamic Law Enactment, 1955, s. 101 (1); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 66 (1).

104. Nawawi: 310.

105. ibid: 283–4.

106. ibid: 305.

107. See *Janat* v. *Sheik Khuda Bakhas*. (1922) 2 F.M.S.L.R. 61.

108. Ahmad Ibrahim, 1968: 117.

109. Selangor Administration of Muslim Law Enactment, 1952, s. 125 (2); Penang Administration of Muslim Law Enactment, 1959, s. 120 (2); Perak Administration of Muslim Law Enactment, 1965, s. 122 (4); Perlis Administration of Muslim Law Enactment, 1964, s. 87 (4); Trengganu Administration of Islamic Law Enactment, 1955, s. 101 (2); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 66 (2).

110. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 120 (2); Malacca Administration of Muslim Law Enactment, 1959, s. 119 (2); Kedah Administration of Muslim Law Enactment, 1962, s. 120 (2).

111. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 123 (2).

112. Selangor Administration of Muslim Law Enactment, 1952, s. 121; Perlis Administration of Muslim Law Enactment, 1963, s. 87.

113. Perak Administration of Muslim Law Enactment, 1965, s. 122; Trengganu Administration of Islamic Law Enactment, 1955, s. 102; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 67.

114. Johore Muhammadan Marriage Enactment, no. 17, s. 7 (i).

115. Pahang Administration of the Law of the Religion of Islam Enactment. 1956, s. 116.

116. Malacca Administration of Muslim Law Enactment, 1959, s. 115; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 116; Penang Administration of Muslim Law Enactment, 1959, s. 116; Kedah Administration of Muslim Law Enactment, 1962, s. 116.

117. Selangor Administration of Muslim Law Enactment, 1952, s. 160; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 154; Malacca Administration of Muslim Law Enactment, 1959, s. 151; Penang Administration of Muslim Law Enactment, 1959, s. 152; Kedah Administration of Muslim Law Enactment, 1962, s. 154; Perak Administration of Muslim Law Enactment, 1965, s. 159; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 159; Perlis Administration of Muslim Law Enactment, 1964, s. 120; Trengganu Administration of Islamic Law Enactment, 1955, s. 138; Johore Muhammadan Marriage Enactment No. 17, s. 7 (ii); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 166, s. 98.

118. Nawawi: 282.

119. A precedent based on the Prophet's acts or sayings.

120. Nawawi: 34.

121. Pahang Administration of the Law of the Religion of Islam, 1956, s. 124 (5); Perak Administration of Muslim Law Enactment, 1965, s. 122 (5); Perlis Administration of Muslim Law Enactment, 1963, s. 87 (8); Trengganu Administration of Islamic Law Enactment, 1955, s. 102 (5); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 67 (5).

122. Nawawi: 308.

123. Ahmad Ibrahim, 1965: 208.

124. Selangor Administration of Muslim Law Enactment, 1952, s. 128; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 123; Malacca Administration of Muslim Law Enactment, 1959, s. 122; Penang Administration of Muslim Law Enactment, 1959, s. 123; Kedah Administration of Muslim Law Enactment, 1962, s. 123.

125. Ahmad Ibrahim, 1965: 209.

126. Cited in Ahmad Ibrahim, 1965: 209.

127. Administrative Rules issued by the Religious Department, Selangor 1962; Negri Sembilan Marriage, Divorce and Reconciliation (Rujo') Rules, 1963.

128. Administration of Muslim Law Act, 1966, Singapore, ss. 80 and 90.

129. cf. Siraj, 1964: 396.

130. Selangor Administration of Muslim Law Enactment, 1952, s. 139 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 133 (1); Malacca Administration of Muslim Law Enactment, 1959, s. 132 (1); Penang Administration of Muslim Law Enactment, 1959, s. 134 (1); Kedah Administration of Muslim Law Enactment, 1962, s. 134 (1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 138 (1); Perlis Administration of Muslim Law Enactment, 1964, s. 104 (1); Perak Administration of Muslim Law Enactment, 1965, s. 138 (1); Trengganu Administration of Islamic Law Enactment, 1955, s. 117 (1); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 83 (1).

131. Nawawi: 387.

132. ibid: 383–9.

133. Selangor Administration of Muslim Law Enactment, 1952, ss. 143–4; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 136–7; Malacca Administration of Muslim Law Enactment, 1959, ss. 135–6; Penang Administration of Muslim Law Enactment, 1959, ss. 137–8; Kedah Administration of Muslim Law Enactment, 1962, ss. 137–8; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, ss. 142–3; Perlis Administration of Muslim Law Enactment, 1964, ss. 107–8; Perak Administration of Muslim Law Enactment, 1965, ss. 140–1; Trengganu Administration of Islamic Law Enactment, 1955, ss. 121–2; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactments, 1966, ss. 87–8.

134. Enactment No. 11 of 1968.

135. Malaysia Act No. 8 of 1968.

136. s. 2.

137. Selangor Administration of Muslim Law Enactment, 1952, s. 139 (2); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 133 (2); Malacca Administration of Muslim Law Enactment, 1959, s. 132 (2); Penang Administration of Muslim Law Enactment, 1959, s. 134 (2); Kedah Administration of Muslim Law Enactment, 1962, s. 134 (2); Perak Administration of Muslim Law Enactment, 1965, s. 138 (2); Trengganu Administration of Islamic Law Enactment, 1955, s. 117 (2); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 83 (2).

138. Nawawi: 387.

139. Pahang Administration of the Religion of Islam Enactment, 1956, s.138 (2).

140. Perlis Administration of Muslim Law Enactment, 1963, ss. 104 (2), 104 (3).

141. ibid: s. 94.

142. Selangor Administration of Muslim Law Enactment, 1952, s. 130; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 125; Malacca Administration of Muslim Law Enactment, 1959, s. 124; Penang Administration of Muslim Law Enactment, 1959, s. 125; Kedah Administration of Muslim Law Enactment, 1962, s. 125; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 130; Perak Administration of Muslim Law Enactment, 1965, s. 130; Trengganu Administration of Islamic Law Enactment, 1955, s. 107; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 73.

143. Surah II: 236.

144. Nawawi: 313.

145. Selangor Administration of Muslim Law Enactment, 1952, s. 126; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 121; Malacca Administration of Muslim Law Enactment, 1959, s. 120; Penang Administration of Muslim Law Enactment, 1959, s. 121; Kedah Administration of Muslim Law Enactment, 1962, s. 121.

146. Selangor Rules relating to Marriage, Divorce and Revocation of Divorce, 1962; Negri Sembilan Marriage, Divorce and Reconciliation (Rujo') Rules, 1963.

147. Perak Administration of Muslim Law Enactment, 1965, s. 124.

148. Perlis Administration of Muslim Law Enactment, 1963, ss. 90–90A.

149. Surah IV: 35, which says: 'And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever knower, Aware.' See also Nawawi: 318–19.

150. Penang Administration of Muslim Law Enactment, 1959, s. 126; Perak Administration of Muslim Law Enactment, 1965, s. 131; Kedah Administration of Muslim Law Enactment, 1962, s. 126; Trengganu Administration of Islamic Law Enactment, s. 108; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 74; Pahang Administration of the law of the Religion of Islam Enactment, 1956, s. 127 (2).

151. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 125; Trengganu Administration of Islamic Law Enactment, 1955, s. 103; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 68.

152. Selangor Administration of Muslim Law Enactment, 1952, s. 127; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 122; Malacca Administration of Muslim Law Enactment, 1959, s. 121; Penang Administration of Muslim Law Enactment, 1959, s. 122; Kedah Administration of Muslim Law Enactment, 1962, s. 122; Perlis Administration of Muslim Law Enactment, 1963, s. 93.

153. Negri Sembilan Marriage, Divorce and Reconciliation (Rujo') Rules, 1963.

154. Perak Administration of Muslim Law Enactment, 1965, s. 127.

155. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 126; Trengganu Administration of Islamic Law Enactment, 1955, s. 109; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 75.

156. Selangor Administration of Muslim Law Enactment, 1952, s. 158; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 152; Malacca Administration of Muslim Law Enactment, 1959, s. 149; Penang Administration of Muslim Law Enactment, 1959, s. 150; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 156; Kedah Administration of Muslim Law Enactment, 1962, s. 150; Perlis Administration of Muslim Law Enactment, 1963, s. 116; Perak Administration of Muslim Law Enactment, 1965, s. 157; Trengganu Administration of Islamic Law Enactment, 1955, s. 136; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 93.

157. Nawawi: 245 et seq.

158. s. 16 (ii).

159. *Ilā* is a vow of continency taken by the husband. At the expiration of the period of continency, the marriage is automatically ended in the *Hanafi* law, but only after judicial proceedings in the *Māliki* and *Shafi'i* law.

160. *Zihār* occurs when a husband likens his wife to the back, or some other part of the anatomy, of his mother or other close relative. After the husband has pronounced *zihār* he cannot resume cohabitation unless he makes specific

expiation, and the wife has the right to petition for either divorce or restitution after expiation.

161. *Li'an* occurs where one person accuses the other of the crime of fornication.

162. Surah II: 229.

163. Taylor, 1948: 10.

164. Nawawi: 299 ff.

165. Selangor Administration of Muslim Law Enactment, 1952, ss. 128–9; Negri Sembilan Administration of Muslim Law Enactment, 1960, ss. 123–4; Malacca Administration of Muslim Law Enactment, 1959, ss. 122–3; Kedah Administration of Muslim Law Enactment, 1962, ss. 123–4; Penang Administration of Muslim Law Enactment, 1959, ss. 123–4.

166. Perlis Administration of Muslim Law Enactment, 1964, s. 91.

167. Pahang Administration of Muslim Law Enactment, 1956, s. 127.

168. Perak Administration of Muslim Law Enactment, 1965, s. 125; Trengganu Administration of Islamic Law Enactment, 1955, s. 104; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 69.

169. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 128; Perak Administration of Muslim Law Enactment, 1965, s. 126; Trengganu Administration of Islamic Law Enactment, 1955, s. 105; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 70.

170. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 129; Perak Administration of Muslim Law Enactment, 1965, s. 128; Trengganu Administration of Islamic Law Enactment, 1955, s. 106; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 71.

171. *Fatimah bt. Harris* v. *Haji Ismail bin Tamin* (1939) 2 J.L.R. 67.

172. Selangor Administration of Muslim Law Enactment, 1952, s. 155 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 147 (1); Malacca Administration of Muslim Law Enactment, 1959, s. 146 (1); Penang Administration of Muslim Law Enactment, 1959, s. 148 (1); Perak Administration of Muslim Law Enactment, 1965, s. 152 (1); Trengganu Administration of Islamic Law Enactment, 1955, s. 133 (1); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 90 (1).

173. Kedah Administration of Muslim Law Enactment, 1962, s. 148.

174. Selangor Administration of Muslim Law Enactment, 1952, s. 155 (2); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 147 (2); Malacca Administration of Muslim Law Enactment, 1959, s. 146 (2); Penang Administration of Muslim Law Enactment, 1959, s. 148 (2); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 153; Trengganu Administration of Islamic Law Enactment, 1955, s. 133 (2); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 90 (2); Perak Administration of Muslim Law Enactment, 1965, s. 152 (2).

175. Nawawi: 318.

176. Selangor Administration of Muslim Law Enactment, 1952, s. 156; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 148; Malacca Administration of Muslim Law Enactment, 1959, s. 147; Perak Administration of Muslim Law Enactment, 1965, s. 153; Pahang Administration of the Law of the Religion of Islamic Enactment, 1956, s. 154; Trengganu Administration of Islamic Law Enactment, 1955, s. 134; Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 91.

177. See Chapter 3.

178. Penang Administration of Muslim Law Enactment, 1959, s. 172 (2); Malacca Administration of Muslim Law Enactment, 1959, s. 171 (2).

179. No. 1 of 1958, s. 5.

180. No. 38 of 1959, s. 2 (2).

181. No. 35 of 1959.

182. Selangor Administration of Muslim Law Enactment, 1952, s. 45 (3); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 37 (3); Perak Administration of Muslim Law Enactment, 1965, s. 45 (3); Perlis Administration of Muslim Law Enactment, 1964, s. 4 (b); Trengganu Administration of Islamic Law Enactment, 1955, s. 25 (b); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s. 9 (1).

183. Selangor Administration of Muslim Law Enactment, 1952, s. 47; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 44; Malacca Administration of Muslim Law Enactment, 1959, s. 43; Penang Administration of Muslim Law Enactment, 1959, s. 43; Pahang Administration of the Law of Islam Enactment, 1956, s. 39; Kedah Administration of Muslim Law Enactment, 1962, s. 44 (1); Trengganu Administration of Islamic Law Enactment, 1955, s.27.

184. Selangor Administration of Muslim Law Enactment, 1952, s. 94 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 89 (1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 86; Perak Administration of Muslim Law Enactment, 1965, s. 92; Trengganu Administration of Islamic Law Enactment, 1955, s. 57 (1); Kelantan Council of Religion and Malay Custom Enactment, 1966, s. 16 (1).

185. Malacca Administration of Muslim Law Enactment, 1959, s. 88; Penang Administration of Muslim Law Enactment, 1959, s. 88; Kedah Administration of Muslim Law Enactment, 1962, s. 89 (1); Perlis Administration of Muslim Law Enactment, 1964, s. 63 (1).

186. [1941] M.L.J. 44.

187. Nawawi: 246 et seq: Withers Payne, 1932: 188–9.

188. See below Chapter 3.

189. (1922) 1 F.M.S.L.R. 204, Taylor, 1937: 72–3.

190. Nawawi: 260 et seq.

191. *Commissioner for Religious Affairs* v. *Tengku Mariam* [1970] 1 M.L.J. 222.

192. S. 3 (2), as amended by the Small Estates (Distribution) (Amendment and Extension) Act, 1972.

193. S.4.

194. S. 12 (7).

195. S. 15 (1) — (2).

196. S. 15 (6).

197. [1972] 1 M.L.J. 59

198. S. 15 (4).

199. s. 19 (1) (a).

200. No. 36/1957.

201. S. 3.

202. The Bankruptcy Ordinance, 1959 (No. 20 of 1959), renders a married woman subject to it in all respects as if she were a *feme sole* — s. 120.

203. S. 9 (1) — (2).

204. S. 9 (4).

205. No. 4/1955 s. 25 (4).

206. [1952] M.L.J. 167. See also *Hujah* v. *Fatimah* [1950] M.L.J. 63, Hooker, 1972: 229–236 and *Bongah* v. *Mat Din*, Taylor, 1937: 16.

207. [1969] 2 M.L.J. 174.

208. [1969] 1 M.L.J. 6.

209. [1971] 1 M.L.J. 265. See also *Ali Mat bin Khamis* v. *Jamaliah bt. Kassim* [1974] 1 M.L.J. 18.

210. The court also will not be bound by the *fetua* of a *Kathi* although if the parties consent it may give effect to it. cf. *Tengku Mariam* v. *Commissioner for Religious Affairs, Trengganu* [1969] 1 M.L.J. 110, [1970] 1 M.L.J. 222 (appeal).

211. For the constitutional history of these states see Sheridan, 1961: 115 ff. On Sabah see particularly Jayakumar (1968).

212. cf. the Sarawak Application of Laws Ordinance c.2 revised laws of 1958, enacted 12 December 1949: the Brunei Application of Laws Ordinance c. 2 of the Brunei laws enacted 25 April 1951; the North Borneo Application of Laws Ordinance c.6 laws of North Borneo, enacted 1 December 1951 amended by Ordinance No. 15/1960.

213. Enacted in 1955.

214. cf. Ahmad Ibrahim (1963–64) (1971).

215. See below Chapter 3.

216. cap. 54 laws of North Borneo, and cap. 93 laws of Sarawak respectively.

217. cap. 91 sections 2, 3 and 6.

218. No. 2/1938 of North Borneo.

219. [1953] S.C.R. 106.

220. Brunei Religious Council and Kathi's Court Enactment, 1955 s. 48(1), Brunei Probate and Administration Enactment, 1955 s. 58.

221. North Borneo Probate and Administration Ordinance, cap. 109, sections 165 f., Administration of Native and Small Estates Ordinance cap. 1, Intestate Succession Ordinance No. 1/1960.

222. Sarawak Administration of Estates Ordinance cap. 80.

223. *Serujie bin Zin* v. *Sanah binti Haji Amin* [1953] S.C.R. 40.

224. [1952] S.C.R. 13.

225. cap. 95 revised laws of Sarawak.

226. See above p. 44 on the difficulties in West Malaysia.

227. In Brunei the provisions of the Religious Council and Kathi's Court Enactment, 1955 s. 48(1) merely provides that the Kathi may hear and determine all actions on Muslim wills. In Sabah the Wills Ordinance cap. 154 of the laws of North Borneo, s. 1(2) amended by Ordinance No. 17/1961 provides that nothing in the ordinance shall affect the validity of a will made by a Muslim according to Islamic law.

228. cap. 81 revised laws of Sarawak 1948.

229. [1949] S.C.R. 5.

230. [1951] S.C.R. 1.

231. [1953] S.C.R. 106.

232. North Borneo Procedure Ordinance No. 1/1926 s. 14.

233. North Borneo Civil Law Ordinance No. 2/1938 s.7.

3

THE MALAY ADAT LAWS

Introduction

In common with the Indonesian world, Malaysia has a number of adat laws no one of which bears any necessary relation to the others. This is a point which must be emphasized, because it is often wrongly assumed that the Malay adats form a homogeneous whole. The very conception of adat itself emphasizes the deceptiveness of this view. The term 'adat' can refer to any of the following:

(i) Manners, etiquette;
(ii) Proper, in the sense of correct;
(iii) The natural order, e.g. the sun sets in the West;
(iv) Law, in the sense of rules of law;
(v) Law, in the sense of concept of law — this is related to (iii), e.g. it is adat that law and religion complement each other.

In any particular circumstance more than one of these meanings may be in point; in addition there are also localized and definite phrases which refer to specific adat institutions. A further source of confusion has been the classification of adat introduced by the nineteenth century colonial administrators. They divided the Malay adats into two contrasting systems: the 'matriarchal democratic *adat perpateh*' and the 'autocratic patriarchal *adat temenggong*'. These classes did not and do not now fit the facts[1] but unfortunately later authors have tended to perpetuate the division.

Allied to this variety of reference is a geographical variety in the Malay adats. In Negri Sembilan and in parts of Malacca there are adats based in a matrilineal form of social organization. In other states the adats are based in a bilateral form of social organization. Further, the forms in which the adats are found vary. In West Malaysia (i.e. in the Malayan peninsula) they are found wholly in judgments of the courts which consist either of the admission of local adat or in the interpretation of enabling statute. In Sarawak (East Malaysia) on the other hand, Malay adat has been for some time codified into a body of law. A final point is that the adat rules

conflict in some respects with those of Islamic law. The major area of conflict is in inheritance. This adds an extra dimension to all the adats of Malaysia although there has been perhaps too much attention concentrated upon this aspect in the past. For example, one comes across phrases such as '... the law affecting Muslims is the Muslim law as modified by Malay custom'[2] or, on the other hand, the law is '...adat varied by the adoption of part of the Mohammedan law'.[3] This is not merely a difference in emphasis but represents a definite ideological view as to which legal system is primary. It is probably best to say that elements of both adat and Islamic law are applicable to the Malays and that the areas of applicability are those determined by the courts. This avoids the taking up of fixed positions which tend, in some cases, to a distortion of the legal reality.

Adat Perpateh

This adat is confined to the state of Negri Sembilan in central Malaya. Its substantive provisions are primarily concerned with land holding, including inheritance, but because of the importance of land to a peasant community it has also rules on marriage, divorce and adoption. In addition, it was the policy of the colonial authorities to preserve, so far as was possible, existing political institutions and this resulted in the retention of the traditional adat officialdom. At the moment adat officialdom survives and is incorporated into the machinery of state government. The relevant social and political groupings in the adat perpateh system are as follows:

(a) The Lineage

This is the smallest socio-political unit in Negri Sembilan and is headed by an *ibu-bapa* ('mother-father') or *buapak*. The Malay term *perut*[4] means 'womb' and the members are supposedly able to trace their descent from a common ancestress. Lewis records that the term appears to cover the lineage and she defines it as 'a quasigenealogical territorial group'.[5] The functions of the *buapak* in respect of the lineage are set out below.

(b) The Clan

The clan is formed from related lineages and is often designated 'tribe'.[6] The clan is a corporate exogamous group. Affiliation is reckoned through the mother and residence after marriage is matrilocal. This grouping forms the framework for economic, social and political relations within the district. The clan is generally associated with a village or group of villages and is ruled by a *lembaga*.[7]

For the purposes of this chapter the clan will be treated as a corporate unit when considering marriage, divorce, and inheritance rules in respect of statutes and judicial decisions. There will be no attempt to discuss the internal structure of this group since this has not proved relevant in proceedings under a formalized legal system.

(c) THE LUAK

The two units so far considered are genealogical but the *luak* is a territorial unit. The name, Negri Sembilan, Nine States, implies a traditional federation of nine *negeri*. The actual number of states has varied, however, at different historical periods and at present thirteen may be distinguished.[8] Theoretically, each luak has four clans but this is apparently an ideal arrangement.[9] Some luak are under the control of a *penghulu luak* also designated *undang*.[10]

The penghulu luak must be distinguished from the *penghulu mukim* who is a government servant with specific duties. A *mukim* is an administrative sub-district, the boundaries of which do not necessarily coincide with the luak or traditional district. Negri Sembilan is divided into six administrative districts. One of these, Port Dickson, is not within the traditional district organization. The luak of Rembau and Jelebu correspond to the administrative districts of those names; the luak of Sungei Ujong is in the administrative districts of Seremban and Port Dickson. The luak of Johol, Inas, Gunong Pasir, Terachi, Ulu Muar and Jempol are included in the administrative district of Kuala Pilah. The remaining luak of Gemencheh and Ayer Kuning and the area under the control of the Tengku Besar Tampin are included in the administrative district of Tampin.

The term luak as used in statutes refers to the traditional district. Titles to land, however, are denoted by a numbered entry in the mukim ('parish') register [E.M.R.], which refers to an administrative sub-district.

It is necessary to state briefly here the relevant statutes and constitutional documents relevant to adat perpateh. The relative statutes and constitutional provisions are as follows:

(a) STATUTES

Customary Tenure Enactment (c. 215 of the revised laws of the F.M.S. 1935).

Customary Tenure (Amendment) Ordinance (No. 23 of 1949).

Customary Tenure (State of Negri Sembilan) Ordinance (No. 33 of 1952).

Customary Tenure (*Lengkongan* Lands) Enactment (No. 4 of 1960).

Undang of Rembau (Lands) Enactment (No. 2 of 1949).

Small Estates (Distribution) Ordinance (No. 34 of 1955).

Small Estates (Distribution) (Amendment) Ordinance (No. 26 of 1959).

Of this legislation, the Customary Tenure Enactment (c. 215 of the revised laws of the F.M.S. 1935) is the most fundamental. This Act was originally passed in 1909 and its replacement in 1926 together with the amendment of 1930 provides the bulk of the Act as it stands at present. Its scope is confined to land the title to which has been endorsed 'customary land'. Enactment No. 4 of 1960, the Customary Tenure (Lengkongan Lands) Enactment, is largely a section by section copy of c. 215 restricted in scope to part of the administrative district of Kuala Pilah in Negri Sembilan. 'Lengkongan land' is land held by one of the 'tribes' specified in schedule A of that enactment, the title to which has been endorsed with the name of one of the clans. As a general rule the principles of interpretation and later comments which apply to c. 215 may also apply to this enactment.

The only other enactment to which attention should be drawn here is the Small Estates (Distribution) Ordinance (No. 34 of 1955), Part III of which applies specifically to Negri Sembilan. This legislation is apparently designed to take account of land which may be 'customary' but the title to which has not been endorsed under the provisions of c. 215. Finally, it should be noted that the provisions of the National Land Code 1965 do not directly touch these enactments. Reference may, however, be directed to the position of non-registered interests under the Code.[11]

(b) Constitutional Provisions

The relevant documents are the Federation of Malaysia Constitution, 1957, as amended, and the Negri Sembilan Constitution, 1958, as amended.

The constitutional and statutory provisions allow a wide measure of continued adat activity, especially in permitting the continuation of law-declaration and law-making processes. In addition, the position of adat officials, under whose control these processes are, is made certain under the relevant instruments; the position of these officials may be summarized as follows.

(i) *The Yang di-Pertuan Besar.* This official is the ruler of the State and is in all respects a constitutional monarch. He is elected by the

four Undang of Sungei Ujong, Jelebu, Johol and Rembau.[12] Under the Negri Sembilan Constitution, his qualifications are that he must be a male, a Malay Muslim, and a descendant of Raja Radin ibni Raja Lenggang.[13] He has power to introduce regulations on Muslim religion and Malay custom[14] and he appoints the Appeal Committees which hear appeals on questions of Malay custom.[15]

(ii) *The Undang* (of Sungei Ujong, Jelebu, Johol and Rembau). The Undang is the elected head of one of the four luak outlined above. The election is a matter of adat procedures and rests upon the principle of *giliran* or rotation.[16] The Undang act in concert with the ruler in matters of state government, especially in any matter affecting the adat.[17] They may also be members of the State Appeal Committee.[18] The Tengku Besar of Tampin, though his office is not elective, has similar rights and duties under the Constitution and statutes.

(iii) *The Lembaga.* This official is elected by the members of his clan, that is, by the *buapak* and *waris.* Elements of giliran are also present in this election. His powers and duties are stated in the principal statutes. Of special importance here is his administrative function of giving evidence as to the content of adat rules in his clan and luak in any proceedings involving the transfer or transmission of adat, or supposedly adat, land.

(iv) *The Buapa.* This official is elected by members of the lineage and has various functions under adat though not specifically under any statutory provision. Thus, the marriage fees are paid through him, *harta terbawa* (property brought to a marriage) is declared before him, he witnesses adoptions within the lineage and debts are paid before him.

The Application and Proof of Adat

Negri Sembilan in common with the rest of the Malay States has adopted a modified version of the Torrens System of land registration.[19] Under this system an estate or interest in land can only be acquired by virtue of due conformity with statutory procedure. In this case this involves the registration in a register (the mukim register) of all titles to any land. Sales, charges and devolutions of land are all entered in the register. The holder of a registered title has a legal estate in land at law. All titles which refer to land owned by a female member of any clan are endorsed with the words 'customary land'. This endorsement acts as a bar to all subsequent dealings in this land and restricts its transfer or transmission to persons who are members of a named clan.

For the purposes of this chapter endorsement may be said to play a dual role in respect of adat. First, it determines whether or not the rules of adat apply in any devolution. Second, it provides a means through which adat rules can be conclusively demonstrated and proved in case of conflict.

Endorsement, under the terms of statute, is the standard test used by the politically dominant legal system to determine the effectiveness of the politically inferior legal system. In the absence of endorsement some law other than adat perpateh will apply, i.e. Islamic law or some local adat, the rules as to which are a question of local proof. The categories of land affected by the legislation fall into two groups; those with endorsed titles and those with non-endorsed titles.

(i) *Endorsed Titles.* The law governing land, the title to which is endorsed 'customary land', is relatively simple. The devolution of such land is governed by the Customary Tenure Enactment as are all matters related to its disposal. In addition, there are special provisions under section 4(i) (ii) enabling the Collector to endorse the titles to certain classes of land. The amendment of 1960 which specifically relates to *Lengkongan* land has provisions parallel to those of the Customary Tenure Enactment. Part III of the Small Estates (Distribution) Ordinance also gives the collector power to endorse land as 'customary land' at his discretion and also to take account of adat matters not specifically covered in c.215.

(ii) *Non-endorsed Titles.* The law relating to land, the titles to which are not already endorsed 'customary land' in accordance with the Customary Tenure Enactment, is more difficult. There are three categories of land not endorsed: land which should have been endorsed when the Customary Tenure Enactment was first introduced in 1909 but was not because of administrative oversight. Upon proof as to the 'ancestral' nature of this land, the collector will endorse the title.[20]

The second and third categories land the titles to which are normally not endorsed are respectively:

(a) *Charian laki-bini* — land acquired by the parties to a marriage through their joint efforts during coverture.
(b) *Charian bujang* — the property acquired by one party prior to a marriage.[21] The law relating to these two categories may be considered together.

The problem in respect of this land is quite simple: how is it to be distributed? Here is land which, on the face of the title, is not

'customary' and thus, so far as c. 215 is concerned, has no connection with adat. In essence, the solution to this problem depends upon whether or not the provisions of the relevant statute, i.e. the Customary Tenure Enactment, totally exclude adat rules from all land not endorsed.

Judicial authority is equally divided on this point. From the period 1926, when the Customary Tenure Enactment was re-drafted, up until 1955, when the Small Estates (Distribution) Ordinance was passed, there was confusion as to the exact scope of the Enactment. This revolved around the interpretation of s. 4 of the Customary Tenure Enactment, subsections (i) and (ii) of which run as follows:

4(i). In the case of any land particulars of which have been or may hereafter be entered in any of the mukim registers of the districts of Kuala Pilah, Jelebu and Tampin in accordance with the provisions of the Land Code or of any previous Land Enactment it shall be lawful for the Collector, at the instance or himself or of any interested party, to enquire whether or not such land is occupied subject to the custom. If he be satisfied that such land is occupied subject to the custom and that it is registered in the name of a female member of one of the tribes included in Schedule B, the Collector shall add to the entry in the mukim register the words 'Customary Land' and authenticate them by his signature; and the addition of such words so authenticated to any entry in the mukim register shall, subject to the result of any appeal to the Resident under Section 15, be conclusive proof that the land to which such entry relates is occupied subject to the custom.

If the Collector is not satisfied that such land is occupied subject to the custom he shall record his decision to that effect and such decision shall, subject to the result of any appeal to the Resident under Section 15, be conclusive proof that the land to which the entry relates is not occupied subject to the custom.

(ii) It shall also be lawful for the Collector in the case of the alienation of lands by the State in the districts referred to in subsection (i) of this section to female members of the tribes included in Schedule B, to add with the consent of the alienee, to the entry in the mukim register the words 'Customary Land' and for him to authenticate the same by his signature, and the addition of such words so authenticated to any entry in the said mukim register shall, subject to the result of any appeal to the Resident under Section 15 of this Enactment, be final and conclusive proof that the land to which such entry relates is occupied as land subject to the custom under this Enactment.

The usual method of dealing with titles under investigation in terms of these subsections was to ask whether or not the land was 'ancestral'. This term was interpreted to mean that land could be proved to have been held under adat for some period of time[23] by

means of evidence given before a Collector. But there was argument as to the exact scope of s. 4(i) and (ii) on the point that interpretation of 'ancestral' should be confined to holdings under Malay Grant only and not to charian laki-bini.

The argument on both sides can be summarized in two judicial examples. In *Indun* v. *Haji Ismail*[23] it was held that non-endorsement precluded adat perpateh. The grounds for this were as follows: first, 'custom' was said to be only law when embodied in statute. This proposition was later expanded[24] into the following principles: (a) the law applicable to Malays in Negri Sembilan is Islamic law except (b) where, in the case of land, that land is proved to be subject to adat by, for example,[25] endorsement and (c) adat is only law when embodied in a statute as otherwise it is uncertain.

On the other hand, in *Re Haji Mansur bin Duseh decd.*[26] the court said that the effect of the Customary Tenure Enactment, as regards land said to be customary, is to replace the unwritten law of custom by the written law of the enactment, in so far as this is possible from the rules of statutory interpretation. However, it also said that non-endorsement does not of itself preclude the application of customary rules. Conclusive proof to the contrary can be advanced by a finding of the Collector under s. 4 of the Customary Tenure Enactment. In *Haji Hussin* v. *Maheran*,[27] the Court gave effect to a finding of the Collector under s. 4 of this Act that the land was not endorsed and was, therefore, not 'customary' in terms of the Act, but held that the rules of adat were not precluded by the Act. It seems that the later authority is to be preferred, i.e. that lack of endorsement does not preclude adat. There are three grounds for this:

(a) *The Scope of the Statute.* The first ground arises from the scope of the Customary Tenure Enactment itself, and its relation to the Torrens System of land registration in existence in the Malay States. The introduction of this system has brought with it the idea of indefeasibility.[28] Indefeasibility of title operates to protect a *bona fide* purchaser for value who has procured the registration of his interest or title, but s. 166 of the repealed Land Code and the new National Land Code do not make clear whether or not a person having an interest under adat may lodge a *caveat* to protect his claim. The effect of the Customary Tenure Enactment seems to be analogous to a *caveat* in that endorsement itself acts as such, and it also gives further protection under s.7, relating to sale and charge of land so endorsed. Further, since the Customary Tenure Enactment

is concerned only with land endorsed 'customary' under s. 2, then its terms are irrelevant to any land not so endorsed. It does not follow from this, however, that non-endorsed land is not subject to adat rules. The Customary Tenure Enactment is also irrelevant to the determination of the law of succession to non-endorsed land since succession only arises upon death; the provisions of the National Land Code do not touch upon the substantive law of succession.

(b) *Judicial Authority.* The second line of cases (i.e. *Haji Hussin* v. *Maheran*) which culminated in *Maani* v. *Mohamed*[29] has reasserted the principle that 'a living body of customary law cannot be destroyed by a written law except by express declaration or by necessary implication'. There is abundant English and Indian authority for this proposition. This is clear enough but some confusion has arisen in respect of decisions given by the Appeal Committee set up under Part III of the Small Estates (Distribution) Ordinance. The Committee is appointed by the Ruler in Council and its competency is confined to questions of 'Muslim law or Malay custom'.[30] The Committee appointed either under this act or under Section 15 of the Customary Tenure Enactment has adjudicated on a not inconsiderable number of appeals relating to endorsement and non-endorsement. As with the High Court, their decisions have been divided on the question of the place of adat in relation to statute. Now so far as the Committee is concerned this whole problem is somewhat illusory. There is no need for it to discuss this question because the competency of the Committee under the relevant legislation is confined to the ascertainment of the rules of adat and the proof of these rules. Questions of statutory interpretation, i.e. as to the scope of an enactment, must belong to High Court jurisdiction.[31]

Similarly, the Collector in making an order for distribution, i.e. making a choice of law, is acting in a judicial capacity.[32] His competency is therefore confined to the ascertainment and proof of adat rules.

So far as judicial decisions are concerned we are faced with the existence of a tripartite body, having separate functions, though the parts are connected by the mechanism of appeal. The Collector decides on the applicability of adat and the appropriate rules in the first instance. Both of these matters are subject to respective appeals to the High Court and the Appeal Committee.

(c) *The Small Estates Legislation.* The third ground for preferring the continued effectiveness of adat despite lack of official endorsement on a land title arises from recent small estates legislation.

Section 24 of the Small Estates (Distribution) Ordinance, 1955, provides as follows:

24. In making any distribution order the Collector ... shall apply the following principles:

(a) if any land appears to be ancestral customary land, though not registered as such, it shall be transmitted to the customary heiress, subject if necessary to life occupancy;

(b) where any property is found as a fact to be *harta pembawa* or *harta dapatan* it may be transmitted to the customary heiress of the deceased subject to the right of any other person to a share in or charge over that property according to the principle of *untong*, where applicable, and on registration of the order the Collector may, if necessary, add the words 'Customary Land' to any title affected but he shall not be bound to do so;

(c) where any property is found as a fact to be *harta charian bujang* or *harta charian laki-bini* it may be transmitted according to the custom of the *luak* and on registration of the order the Collector may, if necessary add the words 'Customary Land' to any title affected but he shall not be bound to do so;

(d) the Collector shall give effect to customary adoptions where they are satisfactorily proved;

(e) in all cases regard shall be had to any partial distribution of property made or agreed upon in the life-time of the deceased and to the existence of any property which is affected by any such distribution or agreement though not part of the estate;

(f) wherever practicable the Collector shall avoid transmitting undivided shares in any one lot to members of different tribes;

(g) where funeral expenses are by the custom chargeable on specific property and the party on whom that property ought to devolve has not paid them, the Collector may require such party to pay the funeral expenses as a condition of inheriting that property or may, by the order, charge that property with the amount of the funeral expenses.

Little comment is needed here except to note that the Customary Tenure Enactment is now confined to dealing with land, the title to which is already endorsed. Section 24, in fact, provides for all disputed points in respect of land which is claimed to devolve subject to adat rules.

Adat Naning

Naning is said to have been one of the original nine states of the old Negri Sembilan[33] but its boundaries were not clearly set out until comparatively recently. The current State Constitution refers to an 'Adat Perpateh Naning' ('which is a custom having no connec-

tion whatever with religion') which is defined as the adat practised in the mukims set out in the second schedule to the constitution.[34] These are as follows:

Ramuan China Besar	Sungei Buloh	Gadek
Ramuan China Kechil	Melekek	Malaka Pindah
Sungei Bahru Ulu	Taboh Naning	Rembia
Masjid Tanah	Pegoh	Sungei Patai
Sungei Siput	Kelemak	Kemuning
Berisu	Pulau Sebang	Tebong
Ayer Pa'abas	Tanjong Rimau	Batang Melaka
Lendu	Padang Sebang	Jas
		Nyalas

The State Constitution makes it clear that only these areas and no others have been definitively designated matrilineal adat areas. Administratively, the adat Naning areas make up the whole of the *jajahan* of Alor Gajah and include also the mukims of Batang Melaka, Jas, and Nyalas in the jajahan of Jasin.

As with the adat perpateh in Negri Sembilan, the adat Naning is primarily concerned with land matters. Again, like the adat perpateh, it is founded in a system of matrilineal clans, of which there are four. The rules of adat Naning on land are largely similar to those of Negri Sembilan, although reliable contemporary data is lacking. The last account was published in 1930[35] but based upon data collected in 1900.

Fortunately there are judicial decisions on this adat which tend to show, though only to a limited extent, the nature of adat Naning as being very similar to the Negri Sembilan adat. The first suit, *Munah* v. *Isam*[36] decided in 1935, turned on the position of the waris in respect of Naning *pesaka* land. The plaintiff was claiming the return of pesaka land which had been transferred outside the clan to a male belonging to another clan who, not being capable of holding this land, had registered it in the name of his wife. The original transfer had been made for purposes of security for loan, but from the time of transfer to the commencement of proceedings the land had increased in value from $60 to $400. The court in finding for the plaintiff and ordering the transfer to her on payment of $60 laid down the following principles. First, if pesaka land belonging to the member of one clan is registered in the name of a member of another clan then the waris of the former clan have a right to redeem the land.[37] Second, the registered 'owner' merely has a defeasible interest conditional upon payment of a sum equivalent to the sum which he himself expended upon 'purchase'. These

principles are interesting as the court quite clearly said, apparently on the basis of expert evidence, that pesaka is not transferable to a person not a member of the owner's clan. This is not the case in the adat districts of Negri Sembilan where such a transfer is permitted if there is no one in the owner's clan able or willing to purchase the pesaka.[38]

In addition to these substantive adat principles three other matters arose in the judgment. First, some attempt was made in counsel's argument to show that the male 'owner' in whose wife's name the land was registered was a trustee in the English [law] sense of this term. The court refused to accept this, noting that he was never required to perform any of the duties of a trustee, e.g. to account for profits. Second, and following from this, the court found that he was in a position analogous to that of a mortgagee. It followed from this that he could not claim the increased value of the land because a mortgagor is bound to pay on the original mortgage price. This is notable as illustrating English law principles being applied in the absence of specific adat rules. It also illustrates the tendency to bias on the part of common law judicial officers toward adat.

Finally, and on a technical ground, the court refused to order any interest on the loan since the male 'owner', not being a trustee, had in fact taken the profits of the land. In addition, the court accepted evidence that 'Naning Malays' never take interest as this is forbidden by Islamic law. Interest is of course forbidden by Islamic law but there is abundant Negri Sembilan authority that any claim in pesaka land entitled the claimant to a share in any increased value in the land.[39]

The next case, *Dato Kamat* v. *Sapian*,[40] decided in 1938, was concerned with whether or not liens or charges can be registered over pesaka land. In the course of its judgment the court found that pesaka land held under adat Naning could only be sold or charged to a female member of the same clan as the vendor or chargeor. It accepted the evidence of the Collector on this point. In addition the court considered the position of the waris. After considering the variable meanings which attach to this term the court stated the following propositions. The waris have a recognized position under the adat. They are not eligible, however, to hold pesaka land under adat because ownership is limited to female members of the clan. This of course is accurate as far as it goes and is in agreement both with *Munah's* case discussed above and Negri Sembilan practice. No other questions of present interest were raised in this suit.

The final decision is *Sapian* v. *Tiamat*,[41] decided in 1939, and was concerned with establishing the qualifications for registration as a customary landholder. It was held that where land is pesaka held under adat Naning then the owner must be a member of one of the four clans of Naning.

These decisions must be read in the light of the Malacca Lands Customary Rights Ordinance of 1886.[42] This act is the end point of a complex history[43] and provides for a customary tenure based on occupation and cultivation. The salient points of the act are as follows:

Section 2

'Customary Landholder' is defined as 'a person in lawful possession of land according to local customary tenure...which was cleared and occupied by him or by the person under whom he claims'. It also includes any person who has been recognised as customary landholder by the Resident Commissioner in Malacca under Section 31. This section provides that the Resident Commissioner may grant any applicant a block of Crown land not exceeding ten acres and recognise him as a customary landholder.

Section 3

The persons qualified to be customary landholders are as follows: any Malay domiciled in the State of Malacca: any person holding a certificate from the Resident Commissioner that he is qualified to hold customary land.

This section has been the subject of judicial proceedings. In *R.* v. *Salim*,[44] decided in 1938, a Chettiar who advanced money to a Malay domiciled in Malacca for the purchase of customary land, was in fact the real owner. His intention was to defeat the Ordinance by placing a nominee in possession. The latter received no rents and profits from the land at all nor had he entered into any mortgage in respect of the land.

Section 5

The ordinance is specifically restricted so as not to affect 'the custom called the Naning custom, or any other recognised customary tenure'.

Section 6

The tenure of a customary landholder is defined, *inter alia*, as comprising (a) the payment of rent or assessment, (b) the liability to give free labour for the common benefit such as was customary prior to 27 February 1890, (c) the duty to plant padi simultaneously with the other customary landholders in the mukim and (d) the duty to conform with the directions of the Resident Commissioner on the planting of certain crops.

Section 7
The penalties for infringing (b), (c) and (d) of (iv) above include fines which may be recovered in court.

Section 9
Customary land shall be forfeited for non-cultivation for a period of three years.

Section 10
Customary land shall be used for agricultural purposes only and not for building purposes.

Section 11
If a deceased customary landholder is a Muslim then the land shall devolve upon 'the person who according to Muhammadan law as varied by local custom, if any, would be entitled....'

In *Abdul Wahad* v. *Haji Wahad*,[45] decided in 1940, this section was applied *simpliciter*. If the deceased is not a customary landholder then the Collector may partition the land or may direct the persons claiming to apply to the court for grant of probate or letters of administration. In other words, a non-Muslim customary landholder may dispose of this land by will whereas a Muslim may not.

Sections 12-14
All mutations in title are to be registered and the Penghulu of the *mukim* in which the land is situated shall attend and identify the parties.

Sections 15-18
Any person who asserts that he is a customary landholder or is entitled by succession to any customary land may apply to the Collector to make an order to this effect. The Collector may make such order if he thinks fit and register this in the Mukim Register. An appeal may lie from such order to the High Court.[46]

Section 19
All changes in possession of customary land shall be notified to the Penghulu of the *mukim* in which the land is situated or to the Collector. The penalty for non-notification is a fine.

Sections 20-29
Customary land may be mortgaged but this must be done at the land office and the mortgage shall be registered. In default the property may be sold but there is an appeal against the order directing sale. All sales must take place at the land office. No mortgage is valid unless made in accordance with the ordinance. The registration of a mortgage is evidence of an indefeasible title except in cases of fraud or misrepresentation.[47]

Section 31
The Resident Commissioner may recognize any applicant as a customary landholder in respect of any land not exceeding ten acres in extent.

Sections 32–36
There may be assessment in lieu of tithe which may be set at so much per acre but not exceeding one-tenth of the value of the produce of the land. The method of assessment may be periodically adjusted and the sum payable is a personal debt for which the customary landholder is jointly and severally liable.

It is obvious that the provisions of the act, as judicially interpreted, bear no relation to the rules of adat Naning. The act instead authorizes an occupation of land confined to Malays and giving full scope to Islamic law. Tenure, though registered under a modified Torrens System, remains indefeasible only while cultivation continues: cultivation itself is hedged about with restrictions. The government retains large discretionary powers over this form of tenure.

It is notable that the provisions of the Malay Reservations Enactments[48] do not apply to Malacca State and one may view the Malacca Lands Customary Rights Ordinance as performing the functions of the Reservation Enactment in Malacca. Thus, one of the effects of section (3) of the Malacca ordinance is to reserve rights to occupation to Malays domiciled in Malacca and the provisions of section 11(i) on the scope of Islamic law tend to bear out this view.

Earlier we discussed three judicial decisions relating to adat Naning. These cases must be considered a second time here because the decision in each of them turned upon provisions in the Malacca ordinance just described. We may commence by noting that section 5 of the ordinance specifically states that 'Nothing in this Ordinance shall be deemed to affect the custom called the Naning custom...'. This has never been judicially interpreted but on its face it seems to mean that the *principles* of adat Naning shall not be affected by the ordinance. The following cases will be considered with the intention of seeing whether or not this observation is justified.

In *Munah* v. *Isam*[49] the point at issue was the refusal of a Collector under section 13 of the ordinance[50] to expunge the name of a registered owner from the Register. The question was decided solely upon evidence of adat Naning and no other provision of the ordinance was cited. This seems to bear out the proposition stated above. The ordinance, in other words, is a mechanism for getting adat Naning disputes to the court and that is its total function in this context.

The next decision, *Dato Kamat* v. *Sapian*,[51] is a little more difficult to reconcile with this proposition. The point at issue here was the validity of a lien or equitable charge over customary land established by deposit of the mukim extract. This necessarily involved a consideration of the provisions of the ordinance. It was held that no lien or equitable charge could be created by delivery and that a customary landholder can only charge his interest in the manner set out in the ordinance. In other words, the ordinance was taken as applicable to all forms of customary tenure including pesaka land. But, in addition to this, the court decided the status of the parties in adat Naning terms. It did not consider, for example, the definition of 'customary landholder' in section 3(2) (a).

The final case, *Sapian* v. *Tiamat*,[52] is the most enlightening on our problem. Here the issue was the validity of an agreement by qualified holders of pesaka to transfer to an unqualified purchaser. In holding that such an agreement was invalid the court stated the following propositions. First, the object of the Ordinance is to maintain Malacca customary landholders in possession and to define the rights of the holders. It is obvious that this is the aim of the Ordinance but it is equally obvious that it cannot define the rights of a pesaka landholder unless a further qualification can be made. This is, and the court made this point also, that where land is pesaka the owner must be a female member of the appropriate clan.

Second, and following from this, a rightful occupier's credentials are then defined as 'Malacca customary landholder, modified where necessary by Naning custom...' (report at pp. 117–18). In the light of section 5, this is a substantial qualification.

We can conclude by noting that section 3 is not exclusive in the light of the three judgments considered. Second, section 5 is to be read as barring the substantive provisions of the statute from applying to Naning pesaka. And finally, that any pesaka dispute may be brought to court under any section of the ordinance which has the sole function of being a mechanical transmitter of adat. It does not replace adat principles in determining the detailed rights of the parties. The Malacca State Constitutional provisions relating to the Dato' Naning tend to have a similar function.

Adat and Harta Sepencharian

Harta sepencharian may be defined as 'property jointly acquired by husband and wife during coverture'. This form of property is generally recognized as a part of Malay adat in all the states of West Malaysia. In the adat perpateh areas of Negri Sembilan the distribu-

tion of such property falls to be determined according to local rules of adat. This is specifically provided for by statute.[53] Such property is termed charian laki-bini and it is equally divided on divorce. In *Hasmah binti Omar* v. *Abdul Jalil*,[54] it was held that the divorced wife was entitled to a half share of the charian laki-bini. This case also brought out the fact that the adat in Kuala Pilah is different from that of Rembau, in that proceedings to recover land can be commenced after divorce. It is also possible under the adat to make a late declaration of *harta pembawa.* The parties in *Hasmah binti Omar* v. *Abdul Jalil* were married in 1950. The husband made no declaration of his harta pembawa at the time of the marriage. During the marriage two pieces of land were acquired in the name of the husband and a third piece was held on approved application in the name of the wife. The parties were divorced in 1955 and the wife commenced proceedings to recover her half share in the charian laki-bini one year later. The husband alleged that the claim should be made only at the time of divorce. He also claimed to set off a half share in certain property which was retained by the wife. On the evidence of the elders of the clan as to the adat prevailing in Kuala Pilah, the judge assumed that the claim to charian laki-bini could be brought after divorce.

In the other states the position is rather more difficult. Claims to harta sepencharian were generally denied in the Straits Settlements. In *Tijah* v. *Mat Alli*,[55] decided in Penang in 1884, the husband and wife had jointly rented lands, the produce of which they had sold. On divorce the wife sued her husband for a half share on the ground that the profits were got during coverture. A Kathi gave evidence that, according to Islamic law, a wife after divorce is entitled to a half share of the joint earnings acquired during coverture and on this basis the court of first instance found for the wife. On appeal, however, this decision was reversed on the basis of the Muhammadan Marriage Ordinance.[56] The decision was based on the interpretation of the provisions of this statute which provided that all dealings with property as between husband and wife should, with certain exceptions, be governed by English law (Section 40 (2)). Nothing in the ordinance dealt with joint earnings by husband and wife.

There are two points arising from this decision which we should note. First, the court and indeed the framers of the ordinance regarded Islamic law as the only law applicable to the Malay people, at least in the colony of the Straits Settlements. Second, Islamic law itself was clearly subject, in its effects, to English law. The court

referred to *Bongah* v. *Mat Din*[57] which was an action to recover a half share in joint earnings. The court refused relief on the ground that English law prevailed, and under this law joint earnings were the property of the husband.

A similar state of uncertainty existed in the Federated Malay States. In *Awee* v. *Ibrahim*[58] a claim was made by a divorced wife for a half share of land acquired during marriage. The action was dismissed on the ground that the court had no jurisdiction to decide a claim for subsistence by a divorced Muslim wife. In *Wan Nab* v. *Jasin*,[59] decided in Kedah in 1922, the judge complained of uncertainty as to both facts and law. As to the former he said that it is impossible in many cases to determine the *quantum* of *sepencharian*, especially where this involves cash and not land. As to law, he noted that in other States the wife is entitled to a one-third share and he made his award on this basis. He also made a plea that legislative attention be directed to harta sepencharian. In 1907 the Perak State Council gazetted a Minute[60] which dealt with the law relating to the division of property on divorce. It made the following provisions: first, when sepencharian is to be divided on divorce, it shall be divided in the proportion of three shares to the man and one share to the woman. This was expressly stated to be a custom (adat) of the Perak Malays. The Minute then went on to say that no Kathi should be allowed to make partitions of property or to decide the nature of property to be included in any partition. The reason for this is that the Minute regards the Kathi as having solely a religious function. The Minute makes this clear when it states that the courts must depend upon the Kathi only for expert opinion on Islamic law. Finally, the Minute stated that gifts between married persons are irrevocable either during marriage or after divorce. This provision settled an earlier controversy which usually revolved around sepencharian property. This was that one party, usually the wife, claimed a share of jointly acquired property on the basis that her husband had given it to her. This was often admitted by husbands but divorce was pleaded as revoking the gift. Wives usually responded to this by pleading that anyway the property was sepencharian and they were therefore absolutely entitled to a share. But the court was now in difficulty because once it had admitted a gift then it was difficult to see how property could be sepencharian. The court's solution to this problem was to award a share to the wife on the basis of remuneration for work done. This is known as *upah*, and the rather confused situation just described has resulted in occasional confusion between this term and sepencharian. The

Minute, however, by dealing with both gift and sepencharian clearly distinguishes between the two concepts.

The Minute has been judicially interpreted. In *Teh Rasim* v. *Neman*,[61] decided in 1919, a divorced wife who had helped to cultivate land acquired during marriage claimed a one-third share. The Special Referee, Raja Chulan, declared that the wife had a claim according to the ruling made by the Perak State Council in 1907. It is interesting to note that the award of one-third share in the property stood even though the wife had been guilty of adultery. In other words, the woman's claim was not based on her status as wife but on the fact that she has in fact helped to acquire and develop land and she should therefore get some recompense for this.[62]

The next point which arises concerns the confusion between sepencharian and *harta sharikat*. The latter refers to partnership property but the courts have often dealt with claims for division of harta sharikat as though they were claims for sepencharian.

Wan Mahatan v. *Haji Abdul Samat*,[63] a Perak suit decided in 1924 (first instance) and 1925 (appeal), was concerned with the interpretation of the term harta sharikat. A divorced wife claimed a half-share of land acquired during marriage on the ground that this was her due as harta sharikat according to *hukum shara*. It was agreed that the parties had no property when they were married. The parties had been divorced by *tebus talak* and the defendant contended that the consideration for this was the waiver of her claim to a share of harta sharikat. The Collector awarded the wife a half-share on the basis of a Kathi's opinion which stated that according to Islamic law 'partnership property' acquired jointly should be evenly divided. This statement should be compared with a later opinion by the Raja di Hilir of Perak who states that property acquired during marriage cannot be described as 'sharikat' unless there is written or verbal agreement to this effect.[64] This comment very neatly points up the distinction between the two forms of property. But the confusion continued.

In *Rasinha* v. *Said*,[65] a Perak case decided in 1926, the court was concerned with the question of the variability of the adat. This was an application for sharikat on divorce. During the argument some interesting points were brought up. First, the Kathi for the Batang Padang district, who was called by consent, stated (a) he knew of no case in his district for an application made to distribute sharikat and, therefore, (b) he would rely on the Perak State Council Minute 1907. He further said that he could not quote or refer to any

[Koranic] authority on the question. The Ketua Kampong on the other hand denied any adat for distribution on divorce at all. But his evidence was not really material as it dealt with movable property only. The appellant cited a custom in Java which provided for distribution but stated that she would be willing to abide by Perak custom.

In the event, the Collector, relying on the State Council Minute, *Teh Rasim* v. *Neman*, *Wan Nab* v. *Jasin* and *Wan Mahatan* v. *Haji Abdul Samat* awarded the wife a one-third share. He noted the variability of custom, or more accurately, the refusal by the Kathi to admit any local adat. However, the Collector did make one rather odd remark: that it is immaterial whether or not a woman has actually worked on the land claimed. There is abundant authority, both from Perak and other States, that this may be a decisive factor in distribution.[66]

The next case, *Laton* v. *Ramah*,[67] provides a variation on this theme in that it involves a claim for division of sharikat property after the death of the husband. This was a Selangor suit and the plaintiff pleaded that all the property of the deceased was harta sharikat according to the Shafi'i school of Islamic law. The problem was complicated, however, since the parties had bought and sold land and it was thus impossible to ascertain the sources from which the different forms of property in dispute had been derived. Two other factors make this decision outstanding. First, the evidence of various Kathis and second the judgment of the Court of Appeal in relation to this evidence.

Two Kathis were examined, the first from Ulu Langut. In effect he said that the doctrine of harta sharikat is part of Islamic law though not laid down in the Koran, and quotes in support the verse, 'Men shall have the benefit of what they earn and women shall have the benefit of what they earn'. The witness states that the interpretation of this principle to include harta sharikat is in accordance with the Koran but though he refers to Nawawi he cannot substantiate this. In conclusion he ends with the statement, 'A law ought to be passed making harta sharikat the law here — it is not carried out here'. The second Kathi (the Chief Kathi of Selangor) gave exactly the same evidence stating that harta sharikat forms part of Islamic law: he referred *inter alia* to Abdul Rahim but no support for his proposition could be found in this authority.

The judge then considered judicial decisions on the point in the course of which he noted the following evidence given by Raja Chulan, the Raja di Hilir of Perak. First, the Muslim law of sharikat

found in Kedah and the Malay States of the east coast is not strictly followed in Perak because of the State Council Minute. Second, sepencharian is not the same as sharikat, which means partnership. Third, sepencharian is allowable in Islamic law when given force to by the Ruler of the State, because the Ruler has discretionary powers in carrying out the laws of God.

The judge also referred to Hurgronje and Wilkinson and his conclusion from these authorities was that an adat, distinct from sharikat, did exist. On the other hand, it is clear that the Kathis admitted some law to exist (which they called sharikat) which, though said to be part of Islamic law, was in fact an adat. On this basis the judge admitted the plaintiff's claim and awarded one half of the estate to her.

This decision was appealed against and the Court of Appeal held (though only by a majority of one) that the case should be sent back for retrial. Its grounds for this were (a) that because Islamic law is not a 'foreign law' within the meaning of the Evidence Ordinance, the evidence as to harta sharikat was improperly admitted, and (b) even if it was a 'foreign law' then the evidence actually given was still not admissible as the books on which the Kathis based their evidence did not comply with the ordinance. This decision therefore meant that the past practice of admitting oral evidence as to the content of a law or custom was no longer valid. The result was that disputed issues of Islamic law were deadlocked as the Collector would have no means of getting evidence. This led directly to the passing of the Muhammadan Law and Malay Custom (Determination) Enactment, 1930, which enabled the Collector to draw up a statement of fact on these topics and submit it to the Ruler in Council for a decision. It is unlikely that any court would now take such a stand on technical matters alone.

The points made by the judge of first instance, however, continued to exercise the courts. In the proceedings which went under the somewhat cumbersome title of *Re Elang decd.*, *Re Kulop Degor decd.*, and *Lebar* v. *Niat*,[68] the issue was once again the sharikat/sepencharian problem. The Collector in this connected suit distinguished two questions; first, if a kampong Malay and his wife jointly acquire property, what rules govern its distribution: (a) on divorce and (b) on death of the husband? Second, does it make any difference if the wife actually worked on the land?

To decide these questions the Collector admitted local evidence as he was entitled to do under Sections 48 and 49 of the Evidence Ordinance.[69] He found the existence of a local adat pithily summed

up — harta sharikat — '*sama sama kerja, sama sa-penchari*' ('together they worked and together they acquired property'). The Collector further expressed the view that the whole sharikat/sepencharian problem was really one of terminology. That is, the term harta sharikat, which strictly applies to a partnership, had been wrongly used to describe the joint acquisition of property during marriage. He found as a fact that there was an adat on this topic. He found further that the share which a wife could receive depended, in lower Perak at least, on whether or not she had worked on the property. If she had she could claim half, if she had not then her share was (perhaps) one-third. Local adat determines the exact proportions.

The next case, *Re Noorijah decd.*,[70] worked its own peculiar variations on the decisions already considered. Here there was land acquired during marriage where the husband was a salary earner, and the wife had not worked on the land. In addition, all the land was registered in the wife's name. After the death of the wife the husband applied for distribution. The local Kathi stated that the deceased had no claim to any of the property acquired: the heirs of the wife therefore took no share and the husband was sole owner. The Collector, however, treated the property as having been jointly acquired after marriage through the joint exertions of both husband and wife, citing *Laton* v. *Ramah* in support. The matter was referred to the Ruler of the State of Selangor in Council[71] who decided that if the lands could not be shown to be a gift to the wife then the estate must belong solely to the husband. On appeal to the Court of Appeal, the decision of the Collector was set aside and the husband declared solely entitled to the property.

This is a somewhat awkward decision. The trouble revolves around the practice of requesting a Kathi's certificate of share distribution while at the same time or possibly later deciding on the exact type of property involved. Thus, the Collector had decided that the land was sepencharian but the Kathi in his correspondence with the Collector refused to consider this question at all. The State Council did consider the question of sepencharian but seem to have taken the same view as the Kathi of Larut in *Wan Mahatan* v. *Haji Abdul Samat*, i.e. if a woman marries a man who earns wages and thus does not work on property which he acquires, then she is not entitled to any share in it on distribution.[72] This decision should be regarded as of doubtful validity.

The final pre-war case is *Teh* v. *Kelsom*[73] which decided quite simply that property acquired before marriage is not harta sepencha-

rian: no questions of substance were raised. Before moving on to later cases we should note a Trengganu Memorandum and a Pahang Opinion on harta sepencharian. The Trengganu Memorandum was drawn by the Hon. Mr. J. L. Humphreys, British Adviser, Trengganu, in July 1924. It is solely concerned with the procedure to prove sepencharian by means of oath. An oath to the effect that land is or is not sepencharian is taken in a Mosque and administered by a Mosque official. This is conclusive as to the status of the property.

The Pahang Opinion (of Chiefs and Kathis of Pahang 1927) deals with both harta sepencharian and harta sharikat. It is set out in the form of questions and answers and its substance can be summarized as follows:

(a) A woman can claim harta sepencharian according to Islamic law or Pahang custom. This includes any kind of property and it may be claimed either on death or divorce.

(b) The terms harta sharikat and harta sepencharian are in practice used alike though the former is defined by certain conditions laid down by Islamic law while the latter is fixed by Pahang custom.

(c) There is no fixed rule as to shares but this may be decided either by agreement between the parties or by the Kathi according to Islamic law.

Even a brief glance at this opinion shows several confusions. First, there is no Islamic authority for a claim to harta sepencharian and the cases which we have considered support this. Second, it is inconsistent for a Kathi to state shares on a distribution of sepencharian because his competency does not extend outside matters governed by Islamic law. Third, the Opinion neglects to note that sharikat refers to partnership property and this is essentially different from sepencharian. Reference should be made to the opinion of the Raja di Hilir of Perak, cited earlier, where this distinction is clearly pointed out.

Before moving on to later cases we should note the position in respect of sepencharian property in the non-perpateh areas of Negri Sembilan. We take as our starting point two mutually contradictory statements: by Caldecott, that Islamic law governs devolution in these districts; and by the Resident of Negri Sembilan that adat temenggong governs.[74] An intermediate proposition is that of de Moubray who says that Islamic law has assimilated adat temenggong and now governs devolution.[75] An actual examination of the registers of title shows that the Resident's interpretation is to be preferred. It has been found that in Seremban the distribution generally

followed a pakat or family agreement and disputed cases were few. In the majority of instances the beneficiaries were the widow or widower and children of the deceased. In addition the children take more or less equal shares by consent. The writer has noticed a similar tendency in the land registers of Kuala Pilah. Indeed in this district the tendency for equal distribution even extends to Collector's distributions. For example, in *Estate of Baba bin Kaji*, a 1963 distribution, the deceased was survived by a sister, four sons and four daughters. Under Islamic law the sister would get nothing, but during the deceased's lifetime he had agreed to give his sister his property. Although there was no written evidence for this, the sons agreed to the distribution and the estate was transferred to her. Similarly, in *Estate of Johan bin Gempar*, where distribution was ordered to the brother and widow of deceased in the proportion of one-fifth to four-fifths. A daughter was completely excluded. These cases are typical of many.

Difficulties raised by the earlier cases on harta sepencharian continued into the period immediately prior to independence. In *Haji Saemah* v. *Haji Sulaiman*,[76] a Pahang case decided in 1948, the widow of the deceased claimed distribution on the basis of sepencharian, alleging that this was the custom of the Pahang Malays. The claim failed on two grounds. First, the witnesses called (several Kathis, including the Chief Kathi of Pahang, and a Penghulu) all agreed that no such adat existed and that Islamic law provided the only method of distributing a deceased's property. Obviously the Pahang Opinion of 1927 had been forgotten or ignored; there is no mention of it in the judgment.

The second reason is more interesting. This was to the effect that according to the English law of evidence no custom was established. English law lays down the following criteria for proof of custom: it must be ancient, unaltered, uninterrupted, uniform, constant, peaceable, reasonable, acquiesced in and certain and definite. These criteria are those used in establishing the existence of a custom at common law *in England.* They do not necessarily apply outside England and there is ample authority from the former Straits Settlements and Federated Malay States that the basic requirements are limited to a reasonable certainty and, in addition, that the custom is not repugnant to Malaysian law. This sort of reasoning is, of course, not confined to Pahang cases. Fortunately this position on the status of adat *vis-à-vis* the dominant legal system no longer obtains.In the light of *Maani* v. *Mohamed*,[77] decided in 1961, adat is fully accepted as a valid system of personal law which

may be judicially proved on the basis of local evidence. The evidence is normally given to a Collector in the first instance and, though it may be refused by the court on its merits, there is no question as to its admissibility.

There are three recent cases on sepencharian each of which has some special features of interest.

In *Roberts (alias)* v. *Ummi Kalthom*[78] the court made the following points. First, that sepencharian is a matter of Malay adat and once clearly established will be judicially noticed. Second, property acquired during a marriage raises a presumption that it is harta sepencharian but this is rebuttable. Third, a divorced Muslim husband can claim a half share as harta sepencharian or immovable property jointly acquired during coverture and the fact that such property is registered in the name of the wife is no bar as the provisions of the Land Code with regard to indefeasibility do not affect matters relating to harta sepencharian. The Perak State Council Minute was cited as settling the quantum of the wife's share at one-third: but the court noted that in other states the share seemed to be one half, citing earlier cases on this point. A similar result was reached in *Lijah* v. *Commissioner of Lands, Trengganu and anor.*[79]

The latest case, *Mohamed* v. *Commissioner of Lands and Mines, Trengganu and anor.*,[80] treats harta sepencharian as above but the court stated that the fact that a woman has never asked about the ownership of land or about her share and that she has voluntarily worked on it, is not relevant in determining whether property is harta sepencharian. This may cause some difficulties in future proceedings because the fact that a wife has worked on the property is likely to be an important element in establishing, as a matter of evidence, that she has some claim.[81]

These cases must be read in the light of the Islamic law legislation which, in all the states of West Malaysia except Johore, gives the Kathi Besar and Kathi jurisdiction to deal with sepencharian property.[82] There are no express references to harta sepencharian in the legislation of Kedah and Perak but the courts of the Chief Kathi and Kathi have jurisdiction to hear any dispute as to the disposition of a claim to property arising out of marriage or divorce.[83] The principle of harta sepencharian is therefore provided for in the Islamic legislation although it is more properly a matter of adat. The jurisdiction of the Islamic courts is not of course exclusive and claims may be and are made in the civil courts for the distribution of harta sepencharian.[84]

Malay Adat in Sarawak

In contrast to the adats of West Malaysia, the Sarawak Malay adat is not well known and nor has it exercised the courts to any great degree. The reason for this, apart from a paucity of data, is that the main principles of the adat were early codified by the Rajahs of Sarawak and enforced by administrative officials.[85] The Undang-undang Mahkamah Melayu Sarawak is now subsidiary legislation administered in the courts by authority of the Native Customary Laws Ordinance.[86] Cases come to the Supreme Court of Sarawak[87] either by original suit or by way of appeal from the Native Court. In both jurisdictions the Undang-undang Mahkamah Melayu Sarawak is the appropriate law; section 5 (i) of the Native Courts Ordinance[88] provides that Native Courts are competent to try, *inter alia*, cases 'arising from the breach of the Malay Undang-Undang or Malay custom ... in which all the parties are Mohammedans'.

The status of the Undang-undang Mahkamah Melayu Sarawak was commented upon in no uncertain terms in *Mahadar* v. *Chee* (*f*)[89] where it was said:

> At the beginning of this hearing I mentioned that this case would not be considered under the Malay Undang-Undang, but it has been represented to me that this is a matter which must be decided under, and judgment given upon the Malay Undang-Undang, and that in the judgment which I give in this Court I must be bound by the terms of the accepted Code of Malay domestic legislation. The material section [of the Malay Undang-Undang] upon which reliance is laid is number 36. The effect of this section is in direct conflict with the bastardy laws of Great Britain which would normally be the guiding principle in any decision given in this Court. While I should hesitate to condemn or even to criticise any strictly religious belief or religious custom which is contrary to my personal views, I feel it is my duty to place on record that in my view the Malay Undang-Undang on this point is in direct conflict with the principles of natural justice. To say, as it does, that the mere fact of pregnancy provides supporting evidence for the pregnant woman's statement that a particular man was the father of her child, is in my view wholly contrary to the most elementary principles of justice and indeed to the ordinary experience of man in every part of the world. Such a fantastic doctrine makes it possible for a pregnant woman to provide for herself and her child by the simple expedient of naming a man whom she believes to be in possession of means sufficient to make an order under the Malay Undang-Undang. Having made this observation I will say nothing more on this aspect of Malay customary law. I feel it my duty to add that

had I been deciding this case in accordance with the British law I should have been bound to find that there was no evidence in corroboration of the woman's statement, which was in any way sufficient to justify a Court of Law in giving a decision in her favour.

On the other hand the courts have given effect to the provisions of the Undang-Undang without difficulty.[90] However, it is more common for decisions given on Sarawak Malay adat to include elements of Islamic law. In Sarawak there has been a notable judicial and administrative reluctance to separate adat and Islam as in West Malaysia. One comes across phrases such as 'Melanau Islam custom'[91] or succession 'under Malay law and custom (hukum Shara) varied by local custom (pencharian)'.[92] These examples illustrate a view of adat and Islam as constituting a unity of law in some sense, which is applicable to the racial Malay of Sarawak. This view is further borne out by the terms of the Undang-Undang itself; it is primarily concerned with the rules relating to betrothal, marriage and divorce. The first twenty-one sections provide for betrothal[93] including the amount of fines for misbehaviour or breach of a betrothal agreement. There are also sections on sexual misbehaviour, trespass into a house for purposes of seduction, and divorce. So far as the latter is concerned, provision is made for the distribution of harta sepencharian and for the payment of debts.[94] Islamic elements are clearly present in some sections, such as section 49 on the capacity to marry of a female according to the *Shari'a*, and section 58 on the talak divorce. The comparative success of the Undang-Undang is perhaps attested to by the very small number of cases reported; it should be remembered that the reported cases themselves tend to see Islam and adat as complementary parts of a set of rules applicable to the Sarawak Malay. There is a notable absence of the tendency to treat adat and Islam as opposed in principle. However, much information is lacking on the Malay adat of Sarawak and a complete description has yet to be written.[95]

Postscript: Adat Temenggong

No term has given rise to so much confusion in Malay adat study as has adat temenggong. Unlike the adat perpateh, the adat on harta sepencharian, or Sarawak Malay adat, this term does not refer to a recognizable or certain body of law. Its lack of precise reference is not helped by the various meanings which have been attributed to it over a long period and which have given rise to some difficulty.

Historically, the first materials to be studied specifically as adat material were the Malayan Legal Digests. These were texts of laws which supposedly applied within the dominions of various Malay sultanates and gave rise to a fundamental classification of adat based upon principles of nineteenth century comparative law. This was a division into adat temenggong and adat perpateh. The former, often translated as the 'law of the Minister for War and Police', was held to be exemplified in the Digests. The latter referred to a 'customary law' which, with the expansion of colonial land administration, was becoming an important factor to the colonial regime. The probability is that the contents of the Digests never applied as legal rules[96] and this was also realized in the nineteenth century as familiarity with the customary law grew. The problem was seen to be especially acute because here were written Digests which, in the evolutionary scheme of authors such as Sir Henry Maine, were 'higher' than mere oral custom. The explanation adopted for this situation is clearly traceable to the fundamentals of Maine's methodology, which was the comparison of Roman law with the law of India and Eastern Europe, so as to illustrate that changes in social groupings were linked with changes in the theory of law, i.e. from status to contract. The version of this adopted for Malay adat was to posit two adat systems, one the 'aristocratic' and 'autocratic adat (temenggong)' and the other the 'matriarchal democratic adat (perpateh)'. The former referred to the Digests which were aristocratic because made by decree of the ruler and autocratic because they tended to define crime as an infringement of the ruler's prerogative. The latter, the adat perpateh, on the other hand was democratic because it is a body of rules (mainly about land holding and transfer) found in the context of a peasant society; it is matriarchal, which we should now call matrilineal, because this adat is founded in matrilineal descent groups.

However, this was not all, and the nineteenth century jurists of adat went on to posit a common origin for both adat systems. They saw the matrilineal adat perpateh as being the original adat but later degenerating into the autocratic adat temenggong. This was due to the subjection of the matrilineally organized peoples into 'Hinduized' kingdoms, such as Palembang, into which were imported the notions of caste and male dominance, both of which found their expression in Digest form. This emphasis upon Hindu influence is a characteristic of nineteenth century British studies of Malay adat, though the details put forward in support of this influence were never more than slight. However, although there may be very

little historical basis for Hindu influence on Malay adat, the attribution of this influence is important in throwing light on the process of comparative law in the nineteenth century. The comparative lawyers of that time saw on the one hand a body of written law, and on the other sets of localized 'customs', one of which, based in a matrilineal social structure, attracted immediate attention. The written Digests were regarded as having some objective existence in reality, and the larger Islamic sections in the Digests provided some warrant for this as it was an observable fact that the Malay population was Muslim. On the other hand, the matrilineally organized Malays were also Muslims, but their adat, though unwritten, was not characterized by objectionable penalties for offences against the status of the Sultan. The explanation for this distinction was therefore sought in ascertaining a common historical origin 'corrupted' by Hindu influence.[97] But the dichotomy — patrilineal-matrilineal or, more broadly, written-unwritten — thus set up has persisted and has even been extended to the present day to the point where any adat which is not clearly founded in a matrilineal social structure *must* be based on patrilineal principles and *must* be called adat temenggong.

The consequences of this equivalence were not only theoretical and of interest just to legal historians, but they had serious consequences in the administration of the law. The equivalence was accepted as fact both by writers on adat[98] and, more important, by government officers. But the problem remained of determining what the rules of this adat were, and to this various answers were returned. These fall into three main classes:

(i) The first is the equation of adat temenggong with Islamic law, viz.

> Adat Temenggong, a form of patriarchal custom which has now assimilated itself almost entirely to Muhammedan law.[99]

This assertion is in no way valid for at least three reasons (common to all of West Malaysia) all of which are connected with inheritance. First, from the evidence of Registers of Title, many titles are in the name of a female and transmissions do not commonly show that titles have been transmitted in the Islamic fractions. Second, there are many transmissions including transmissions to women as 'representatives'. Third, it is extremely common to find titles in the name of a man and a woman in equal shares. In other words, in the highly important field of land inheritance and ownership there is absence of Islamic principles in favour of some other form of land holding.

(ii) The second alternative is that adat temenggong is a set of rules relating only to the distribution of land among heirs at the death of the owner. These rules are to be distinguished from the rules of adat perpateh but related to them as part of a unitary whole. This view owes much to the historical premisses set out earlier, in particular to the idea that both adats share a common origin. It has received judicial expression in only one case, *Shafi* v. *Lijah*,[100] which was concerned to decide whether the inheritance of land should be in accordance with Islamic law or adat law. The judge precluded adat perpateh because the title to the land in question was not endorsed,[101] and also precluded Islamic law on the sole ground that the deceased intended some adats to apply. His reasoning on the relationship of the adats was as follows:

> But although the more defined tenets of the *Adat Perpateh* may not in this case be adhered to, there remains the still older and perhaps more fundamental *Adat Temenggong*, which one might perhaps almost term the common law behind the more statutorised *Adat Perpateh*, though whereas in England statutory law evolved from the common law, in this country one might almost conclude the reverse -- that the *Temenggong* is from the law or codes of by-gone generations. I suggest this notwithstanding *Wilkinson's* observations [....] 'The true *Adat Temenggong* of Malaya was an unwritten law,' it was and is unwritten, deriving its origin from the lawgivers of ancient times. Another simile is that *Adat Temenggong* was as the royal prerogative, and exercised in suitable cases where strict adherence to the *Adat Perpateh* would cause hardship. The holder of the Ministerial Office of Temenggong exercised on behalf of the ruler the prerogative which could not be challenged, it was an autocratic decree and should in proper circumstances the *Adat Perpateh* conflict or differ from the code of conscience the *Adat Temenggong* could be invoked and and so over-rule the former.
>
> It seems to me clear and I accept the evidence of Lijah accordingly, that the deceased Abdul Majid acquired this property for the benefit of his widow and adopted daughters. He did not contemplate the administration of his estate in accordance with the inheritance scales contained in Shafii School of Mohammedan Law. He intended some form of local customary law to apply, although he was probably quite vague as to detail or principles. Therefore ... I distinguish the two *Adats* and rule that the *Adat Temenggong* should apply.
>
> This means that the estate should be distributed equitably between the claimants, such division being decided by the circumstances of the particular case before the court. It is not a division necessarily to be followed in every such case.

This analysis of the relationship between the two adats is incorrect. Apart from its historical inaccuracy, the basis of the classification

of property in adat is quite different from that in English law. In adat the mode of acquisition determines the classification of property and the distinction between law and equity is unknown. This case is therefore no authority on the relationship between the adats and is a striking example of the excessively culture bound reasoning sometimes apparent in Malay adat studies.

(iii) The third alternative is to regard the term as applicable to either of the following occurrences:

(a) As referring to informal agreements (pakat) concerned with distribution of property where the parties concerned are not subject to adat perpateh. The term is used in this way in some of the coastal kampungs of Malacca.

(b) The term is sometimes used to refer to the rules on the distribution of harta sepencharian.

Both these usages are quite permissible but they do have one danger: this is that the use of the term itself may give rise to the assumption of historical characteristics which are ill-founded. It is perhaps safer and less confusing to avoid the term whenever possible.

1. cf. Hooker, 1973: 497–8.
2. Ahmad Ibrahim, 1965: 147.
3. Taylor, 1948a: 164–5.
4. Josselin de Jong (1951: 122) is of opinion that this unit corresponds to the Minangkabau (Sumatra) perui'.
5. cf. Lewis, 1962: 87.
6. This term is used extensively in the literature on adat perpateh and also in statute and judicial decisions. Its meaning in the present context is confined to those 'tribes' (i.e. clans) listed in the schedules to the enactments set out below. Similarly, 'tribal land' is land registered in the name of a member of one of the 'tribes', the title to which is endorsed 'customary land'.
7. His legal functions are dealt with below; see also Josselin de Jong, 1951: 145.
8. cf. Josselin de Jong, 1951: 123.
9. cf. Winstedt, 1934: 81.
10. i.e. the luak of Sungei Ujong, Jelebu, Johol and Rembau.
11. cf. Wong, 1967: 36.
12. Art. 10. Negri Sembilan Constitution 1958.
13. Art. 10 (1) (2).
14. Art. 41 (2) (a).
15. Under: The Small Estates (Distribution) Ordinance (No. 34 of 1955) Part III, ss. 19 (1) (a) 25, 29: The Customary Tenure Enactment, c. 215, and amendment No. 4 of 1960, s. 15.
16. cf. Josselin de Jong, 1951: cc, ix, x.
17. Arts. 61, 62, 67, 68, Negri Sembilan Constitution 1958.
18. See n. 15 above.
19. The basic act is the National Land Code (Ordinance 56/1965).

20. An application for endorsement was made in 1965, and is described in the suit, *Re Minum binti Ahmad*, Collector's file no. 050/1965. The land in question was originally registered as Malay Grant land in 1906. When the Customary Tenure Enactment came into force in 1909 this land should have been endorsed 'customary' under s.10 of this enactment. This was not in fact done but the Collector in 1965, on proof that the land was in fact adat land, so endorsed the title. The proof consisted of the signature of a lembaga on the 1906 document which the Collector regarded as conclusive evidence that the land was subject to adat.

21. The relevant categories of adat property are as follows:
Charian: (a) *charian laki-bini.* Property acquired during lifetime of the owner used in opposition to pesaka, 'ancestral property' (see also pesaka), divided equally on divorce. (b) *charian bujang.* This is property acquired by one party before marriage: it is either harta pembawa or harta dapatan (see below).
Harta dapatan: ancestral property brought to a marriage by the wife which reverts to her on divorce.
Harta pembawa: inherited non-pesaka property brought by a husband to the marriage. On divorce it reverts to him.
Pesaka: family property, especially quasi-entailed property. Used in opposition to charian property.

22. There was (and is) naturally no agreement as to the length of time (cf. Moubray, 1931: 247–68) and conflict around this point opens up fundamental questions on the nature of adat property in general and its formal legal administration in particular. The most reliable historic summary concerning the period 1926–1939 is given in Taylor (1948) where, leaving aside the position of Islamic law, the question was the status of adat either as a law attaching to individuals (i.e. as a 'personal law') or to specified areas of land. Taylor's view is that the former is the correct interpretation so that the property of any Malay who is a member of one of the named clans devolves according to adat rules: it is immaterial whether the property is situated in Negri Sembilan or not. On the other hand, many officials, including Caldecott, were of the opinion that adat rules applied only to specified land, *viz.* land already endorsed 'customary'. Since 1955 the second view is no longer wholly accurate as the Small Estates (Distribution) Ordinance of that year has made provision for endorsement on proof of adat tenure. But this does not completely dispose of the problem of the ownership of property not being land within the state. Part III of the Small Estates (Distribution) Ordinance 1955 applies only to property situated in named areas of Negri Sembilan (s.20(3)). Where property is situated elsewhere the provisions of Part II and, in particular, section 12(4) apply. This allows the Collector to ascertain the applicability of any customary law to the devolution of the estate of the deceased so it would seem that under this section adat rules as to inheritance could apply outside the state.

23. [1939] M.L.J. 65.

24. *Derai* v. *Ipah*, Seremban Civil Appeal No. 6/1949.

25. [There are no italics.]

26. [1940] M.L.J. 110.

27. [1946] M.L.J. 116. *cf.* also *Maani* v. *Mohamed* [1961] M.L.J. 88.

28. cf. Section 42 of the repealed Land Code of the Federated Malay States now re-enacted in Section 340 of the National Land Code, 1965.

29. [1961] M.L.J. 88.

30. cf. Sections 19(1) (a) and 25 of the Small Estates (Distribution) Ordinance, 1955.

31. So far as the writer can ascertain from transcripts of Seremban Civil Appeals since 1955, the Committee has always based its decision on facts, though there are certainly assumptions of law inherent in the decisions.

32. cf. Section 4(i) (ii) above and Section 24 of the Small Estates (Distribution) Ordinance, 1955. See also the recent case *Hajjah Sitam* v. *Hassan & anor.* [1973] 2 M.L.J. 110, on the definition of *Waris.*

33. cf. Wilkinson, 1911: 13–14.

34. State Constitution 1957, Art. 34 (5).

35. cf. Blagden (1930).

36. [1935] S.S.L.R. 366, [1936] M.L.J. 42.

37. The position in the adat perpateh districts is similar: *cf. Bador Samat* v. *Loyok & Ganda* (Taylor, 1929: 193) where it was held that the waris are entitled to an option on any land at a price not exceeding a fair and reasonable valuation of the land.

38. *Sihi* v. *Baiyah & Sipau* (Taylor, 1929: 192) where it was held that a clan must pay the price offered by a member of any other clan if it wishes to retain the pesaka.

39. The authority for this is now contained in legislation. Section 24(b) of the Small Estates (Distribution) Ordinance, No. 34 of 1955, provides for transfer taking account of untong where applicable.

40. [1938] M.L.J. 111. This suit is connected with the decision *Sapian* v. *Tiamat* [1939] M.L.J. 116, discussed below though the matters raised in each suit are dissimilar.

41. [1939] M.L.J. 116.

42. C. 125 revised laws of the Straits Settlements 1936 incorporating the following amendments: 1/1890, 17/1901, 24/1902, 22/1905, 30/1906, 33/1907, 2/1914, 27/1917, 16/1922, 7/1931, 10/1952, 5/1956.

43. cf. Hooker 1972: 103–5 on 'statutory adat'.

44. [1938] M.L.J. 210.

45. [1940] M.L.J. 263.

46. *Tan Lian* v. *Hussein bin Mohamed* (1891) Straits Law Reports 5.

47. *Re Malacca Lands Customary Rights* (1921) Quarterly Notes 1, on s.28. See also *Re Customary Land Serial No. 1031 Sungei Rambei* (1958) 2 M.C. 117 where the court dealt *inter alia* with rectification of the Register.

48. C. 142 revised laws of the Federated Malay States, as amended by 28/1936, 51/1936, 3/1938, FI/1948, 25/1954.

49. [1936] M.L.J. 42.

50. Now section 30(4).

51. [1938] M.L.J. 111.

52. [1939] M.L.J. 116.

53. Small Estates (Distribution) Ordinance No. 34/1955, Part III.

54. [1958] M.L.J. 10.

55. (1890) 4 Ky. 124. Taylor, 1937: 15.

56. 1880. Now c.57 revised laws of the Straits Settlements 1936.

57. Unreported but cited in Taylor, 1937: 16.

58. (1922) 1 F.M.S.L.R. 274.

59. Taylor, 1937: 20–1.

60. Perak Gazette, 5th April, 1907, p. 241. cf. also Taylor, 1937: 70.

61. Taylor, 1937: 18–19.

62. cf. also *Re Sohor*, a Negri Sembilan case (Parr & Mackray, 1910: 91), where the Supreme Court affirmed an order for the division of pencharian in favour of a wife who had been convicted of adultery in a criminal court.

63. Taylor, 1937: 25–8.

64. cf. Taylor 1937: 41.

65. Taylor, 1937: 29–34.

66. Taylor, 1937: 34.

67. (1927) 6 F.M.S.L.R. 116, Taylor 1937: 35–47.

68. Taylor, 1937: 48–57.

69. Though the court in *Laton* v. *Ramah* excluded *oral* evidence, this does not exclude the admission of evidence on local custom. cf. Taylor, 1937: 54.
70. Taylor, 1937: 59–66.
71. Under the Muhammadan Law and Malay Custom (Determination) Enactment 1930.
72. It should be noted that none of the judicial authorities considered registration as of itself constituting a gift to the wife.
73. [1939] M.L.J. 289. Taylor, 1948: 106.
74. cf. Taylor, 1948a: 80–81.
75. Moubray, 1931: 5.
76. [1948] M.L.J. 108.
77. [1961] M.L.J. 88.
78. [1966] 1 M.L.J. 163.
79. [1967] 1 M.L.J. 76.
80. [1968] 1 M.L.J. 227.
81. The claim, of course, may be only for work done as such, known as upah, cf. *Haji Ramah* v. *Alpha* (1924) 4 F.M.S.L.R. 179, Taylor, 1937: 22. This case must be regarded as doubtful authority, see Hooker, 1972: 248.
82. Selangor Administration of Muslim Law Enactment, 1952, s.45 (3); Negri Sembilan Administration of Muslim Law Enactment, 1960, s.41 (3); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.37 (3); Perlis Administration of Muslim Law Enactment, 1964, s.4(b); Trengganu Administration of Islamic Law Enactment, 1955, s.25(1); Kelantan Shar'iyah Courts and Muslim Matrimonial Causes Enactment, 1966, s.9(1).
83. Kedah Administration of Muslim Law Enactment, 1962, s.41(3); Perak Administration of Muslim Law Enactment, 1965, s.45(3). See also the Perlis Administration of Muslim Law Enactment 1963 s. 94, Perak Administration of Muslim Law Enactment 1965 s.138(3), Penang Administration of Muslim Law Enactment 1959 s.40(3), Malacca Administration of Muslim Law Enactment 1959 s.40(3).
84. cf. *Roberts alias Kamarulzaman* v. *Ummi Kalthom* [1966] 1 M.L.J. 163. *Lijah binte Mahmud* v. *Commissioner of Lands and Mines, Trengganu and anor.* [1967] 1 M.L.J. 76, *Mohamed* v. *Commissioner of Lands and Mines, Trengganu and anor.* [1968] 1 M.L.J. 227. *Ali Mat bin Khamis* v. *Jamaliah bt. Kassim* [1974] 1 M.L.J. 18.
85. The Undang-Undang Mahkamah Melayu Sarawak was first published in 1910 and was based on earlier codifications.
86. Cap. 51 revised laws of Sarawak.
87. Which is also the Supreme Court of Brunei and North Borneo.
88. Cap. 43 revised laws of Sarawak 1958. Set out in Chapter 4.
89. [1941] S.C.R. 96 at 96–7.
90. cf. *Haji Mohidi bin Ana* v. *Spiah binti Haji Samat* [1951] S.C.R. 22.
91. *Serujie bin Zin & anor* v. *Sanah binti Haji Amin* [1953] S.C.R. 40.
92. *Men binti Lockman* v. *Dan bin Dol* [1952] S.C.R. 13.
93. 'Pertunangan'.
94. Given effect to in the cases cited in notes 90–92 above.
95. cf. Abang Yusuf (1966) for a pioneering account on the subject of marriage.
96. Hooker, 1968a: 169.
97. See Wilkinson (1908).
98. cf. Buss-Tjen (1958).
99. Moubray 1931: 5.
100. [1948–49] M.L.J. Supp. 49 [1949] M.L.J. 65.
101. Lack of endorsement alone does not preclude adat — see above pp. 69 ff.

4

DAYAK* ADAT LAWS

Introduction

COMPARATIVELY little attention has been directed to the laws of East Malaysia comprising the states of Sabah and Sarawak. In these states there exists a rather curious amalgam called 'Dayak adat' or 'Dayak adat law'. Dayak adats have recently come into prominence in a rather negative way in that, at the time of writing, a Royal Commission is sitting in Malaysia and is considering the status of the laws mentioned above in respect of marriage and divorce.

The terms of reference of the Commission are as follows:

> (i) to study and examine existing laws relating to marriage and divorce (other than Muslim marriages) and to determine the feasibility of a reform, if any is considered necessary, in particular, in the light of the resolution of the United Nations Convention on consent to marriage, minimum age for marriage and registration for marriages;
>
> (ii) to receive and consider representations that might be submitted from any racial or religious group affected or likely to be affected by the changes or reform of the existing marriage or divorce laws; ....

In a press release put out by the Commission on 17 May 1971, the following statement occurs:

> ... It is not recommended that any amendments be made in the prevailing laws of Sarawak, or for that matter Sabah [i.e. East Malaysia] relating to marriage and divorce. They appear to be adequate to the needs of the inhabitants of those territories and there is evidence to support the belief that change merely for the sake of change will not be welcome.

The immediate question which presents itself is not so much why such a stand should be taken but what are the laws mentioned in respect of East Malaysia? The answer includes, as well as Chinese customary law[1] and Malay adat,[2] the Dayak adats. It must not be forgotten, however, that the national legal system of Malaysia, including Sarawak,[3] is founded in English law; the indigenous

*The term 'Dayak' may be anthropologically inaccurate but it is retained because of its judicial use.

laws permitted by English law to continue in effect are so permitted on the canons and assumptions of English law. This is an important point in that the written laws of the state consist of imperial and local legislation, the latter being contained in revised editions of the laws, the latest being dated 1958. The common law of England, the doctrine of equity, and English statutes 'of general application' apply by virtue of local legislation.[4] The terms of section 2 of the Sarawak Application of Laws Ordinance are interesting on the point of limiting the scope of common law.

> Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:
>
> Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

This statement of principle is reminiscent of general Malaysian practice[5] but one important qualification needs to be noted here. This is that the sources of law recognized by the courts are not yet settled and may possibly vary depending upon the particular race of the parties to proceedings. In *Kho Leng Guan* v. *Kho Eng Guan*[6] the sources of law in Sarawak were stated to be:

(a) Orders or written laws enacted by or with the authority of the (former) Rajah of Sarawak
(b) English law in so far as it is not modified by (a) and is applicable to Sarawak
(c) The law and custom of races indigenous to Sarawak.[7]

This last includes 'Mohammedan and Dayak and other customs concerning marriage and inheritance[8] and also certain customs by which criminal sanctions are imposed e.g. for adultery and incestuous relations as understood by Malay and Dayak custom'. The position on recognition of Dayak laws, however, is rather better than that for the Chinese: the reason being both that legislation from the Rajah's period, specifically for the Dayak, exists and second, that the Dayak is classified as a 'native' and hence is a beneficiary to wide ranging protective legislation including a special court system (cf. below).

These comments introduce us to some of the more complex problems which arise in respect of Dayak adats. The Dayak peoples

possess a system of law (adat) which they traditionally administered to themselves without the assistance of any outside agency and which included rules dealing with matters such as religion as well as with a range of topics such as marriage and inheritance. With the introduction and development of a colonial administration this total body of adat was *selectively* administered by European district officers who not only reduced many rules to writing but also in so doing decided what particular rules were to be considered 'legal'. These written summaries have been cited in judicial proceedings but at the same time local oral evidence on points of adat has also been admitted either as a matter of evidence or under the authority of some statute dealing with the implementation of native law and custom. It is thus clear that any purported description of Dayak adat must commence with a description of the indigenous view of adat, first as a part of the indigenous social structure and second as this has been admitted as legally relevant by the introduced common law.

The 'Dayaks'

This term has been used in legal literature to refer to two separate peoples, the Iban (also known as 'Sea Dayak') and the Land Dayak. The former comprise about 29 per cent[9] of the indigenous population and are largely concentrated in the Second and Third Divisions[10] of Sarawak. The Land Dayak, on the other hand, comprise about only 6 per cent of the total population and are largely resident in the First Division in south-west Sarawak. It is the former that the judicial authorities have had cause to consider in law although the legislation which exists (see below) covers both groups. Our attention will be mainly confined to the Iban for whom adequate anthropological and legal data exists.

The basic unit of Iban social and legal organization is the *bilek-family*. The members of such a group are always closely related by kinship and affinity but, as Freeman specifies, 'it is a unit primarily defined by the criterion of local residence'.[11] It occupies only one of the separate apartments of a longhouse and it possesses land and property in its own right.[12] An individual is born into one particular *bilek*, either of the father or of the mother, as marriage is either virilocal or uxorilocal. In addition, a person may become a member of a bilek by adoption. The persons adopted are normally close kin and become full members of the bilek. The process is public and subject to a definite agreement (*danyi*) together with ritual observances.[13] Marriage which, as we said, is either virilocal or uxorilocal,

confers full rights of membership in the bilek unit. On divorce, the partner who has no natal or adoptive rights in the bilek has no option but to return to and resume membership of his or her natal (or adoptive) bilek. This raises in its most acute form the very important question of inheritance with which, incidentally, the formal legal system is most often concerned (see below). The fundamental principle of inheritance is that so long as an individual remains a resident member of his or her bilek-family (either by birth, adoption or marriage) then that individual possessess full and equal rights of inheritance. Thus, if a man dies as a member of his natal or adoptive bilek-family all the property he has acquired is inherited equally by the surviving members of that family. That is, by his parents (if still living), his wife and children, and by any of his siblings and their spouses and children who are still resident members. Again, if a man dies as a member of a bilek-family into which he has married, all the property he has acquired remains in this group, i.e. his parents-in-law, his wife and children, and his wife's siblings and their spouses and children who are resident members, inherit equally.

This equivalence of inheritance claims implies the possibility that any sibling may claim his or her share of the bilek inheritance and set up a separate domestic unit, a process which Freeman describes as 'partition'.[14] This is quite common and may be the result of internal quarrels but the relevance of partition is the light which it throws on the nature and classification of property in the Iban system. Apart from personal possessions such as clothing, ornaments and so on, all other forms of property rest in the bilek-family. This includes valuable inherited objects (pesaka) such as Chinese jars, bowls, fabrics, boxes, etc., plantations of fruit, padi land and padi seed. Such property is classified into two forms, that which is subject to partition and that which is not. The former includes two categories of ritual property, *padi pun* (a strain of sacred rice) and *batu pemanggol* (a ritual whetstone). These stay with the original bilek but the new bilek which hives off is presented with a special category of *padi* which is elevated to become its padi pun. Similarly, a new batu pemanggol is created by the appropriate ritual. Though this category of property has not been the subject of formal judicial proceedings, it is important here because it emphasizes that in Dayak adat the non-material element in the adat rules is of great importance. Non-ritual property, the second classification, is partible on a *per stirpes* basis and the individual shares (*ungkon*) then form the basic property of the new bilek-family.

The bilek is part of a longhouse and the number of bilek-families in the longhouse may vary from four or five to as many as fifty, although the median is about eighteen or twenty. Each longhouse is situated on a specified area of land and there are always recognized boundaries between the respective areas under the control of neighbouring longhouses. It was and is common for the bilek-family to leave one longhouse and join another where (cognatic) kin are already members.[15] Pressure on land resources is the most frequent cause for this sort of migration, but it has for many years been more or less strictly controlled first by the Rajah's government and latterly by the Sarawak state government. However, to gain access to new land the bilek-family must attach itself to an already established longhouse and this is only possible where kinsfolk are already settled and prepared to give some help as, for example, in providing the loan of cleared land for a season.

The territory attached to the longhouse is as such owned by it but the residence in the longhouse of a bilek-family gives it a right of access to the surrounding land.[16] Ownership is established in the bilek-family by the felling of virgin forest by members of particular bileks. These rights may be lost by migration or they may be taken up by remaining kindred and this includes the secondary jungle growth which springs up. However, in areas where land is scarce the legal position is much more complicated because transactions, either of loan or sale, are entered into regarding land. This naturally has repercussions within the bilek-family but it also involves questions of longhouse area boundaries, and the government classification of land. For the time being, however, we return to a final and important point on the longhouse. This is that every Iban longhouse has two officers of importance, one secular and one ritual. The former is the *Tuai Rumah* and the latter the *Tuai Burong*.[17] The Tuai Rumah is the custodian of adat in the community and his main function is to administer that law. His capacity does not extend outside of this except that, as has been the case for the past decades, he is also the link between his longhouse and the government. He is regarded by the latter as the representative of his community and government edict is channelled through him. He has some functions under legislation to hear and determine (in accordance with adat) suits up to certain amounts so that, in his judicial function, one may say that his indigenous legal function has been reinforced by government.[18] The office is neither hereditary nor elective though it does tend to go, by way of a discussion leading to a general consensus, to a member of the earliest bilek-families

in a longhouse. Qualifications for the post include a reputation for upright dealing, a high degree of competency in day to day affairs and, most important, a deep knowledge of adat and its application. Breach of adat is not just a secular matter, it very often involves the ritual life of the longhouse and it is here that the Tuai Burong has a relevance in Iban adat.[19] As we shall see, the Iban conception of adat includes ritual offences or transgressions which are subject to an adat penalty, usually in the form of fines. It is the function of the Tuai Burong to perform the necessary ritual and sacrifices so as to preserve the longhouse against the evil consequences of transgressing a ritual prohibition (*Pemali*). The prohibitions and penalties are fully prescribed in the adat and it is this which we now go on to consider.

Adat and the Iban

We commence with first establishing the range in meaning of the term 'adat'. A useful starting point is the well-known definition of Wensink and Kramers:[20]

> Custom, usage. In law, the indigenous customary law concerning all jural relationships in Islamic countries, having no direct connection with religion and existing in spite of canonical statutes. In languages of the Muslim [and pagan] peoples of the Malayan Archipelago, the word *adat* is used, sometimes with idiomatic modifications, to mean usage, custom, common practice. The application of the word extends to everything to which an individual or society is accustomed, as well as to all human motives and tendencies; an animal also has its *adat*.

So far as the Malaysian adats in general are concerned there is a similar range in meaning:[21]

(i) manners — etiquette;
(ii) proper, in the sense of correct;
(iii) the natural order, *e.g.* rivers run downhill, the sun sets in the west and rises in the east;
(iv) law — in the sense of rules of law;
(v) law — in the sense of concept of law — this sense of *adat* is related to (iii) above, *e.g.* it is *adat* that law and religion complement each other and do not clash.[22]

The particular problem so far as the Dayak are concerned is well set out by Richards[23] in his explanation of offences, specifically in relation to the introduced legal and administrative system:

> There is a blurring of the distinction between the law as embodied in ordinances, the custom that requires fines in case of offences against it

and ordinary rules of social behaviour. The first is imposed and administered by authority from outside the longhouse community: the third may be mixed with the second in varying degrees according to the conditions under which a particular community exists.

It is the second, the customary law, which an attempt is made here to explain. The longhouse of several *bilek* families is not simply a peculiar manner of constructing a village. It is an independent unit relying for its continued existence upon the creation and maintenance of a relationship with the 'unseen powers'. These include the gods and the dead whose help is sought, the evil and mischievous powers of the hills and forests whose forbearance or exclusion is sought. By the proper conduct of ritual, from the major and minor 'festivals' (*gawai*) to the provisions of offerings, the exercise of 'magic' and utterance of words of power, the people and their possessions must be kept in a satisfactory state of balance among themselves and in relation to the 'unseen powers'.

Each has its effect upon its neighbours and may be said to possess its own 'soul', 'life-circle' or area of influence. Guidance as to when or where something is best to be done is sought from the gods through their messengers, the omen-birds, and the reading of a pig's liver, or from a dream in which guidance may be given by a tutelary spirit or an ancestor. In carrying out a project so approved, measures are taken to propitiate any spirit of evil that may cause its failure and to enhance its success by the use of magical objects (charms), many of which are provided by ancestors or pointed out by them in dreams.

In houses, the site, the posts, the ridge beam and the main steps have particular ritual importance and a life of their own. In farms, the padi, the earth itself and the inhabitants of the surrounding forest have their 'soul'. Similarly articles of property may have their own life, as people in their families have. All these, and the people, must be in balance together.

Any disturbance of the balance must be corrected without delay, or the entity which is the community or family will be damaged or perhaps destroyed. Everything has value, whether tangible or not. The value is not in money but is capable of expression in terms of physical objects of ritual worth: for instance, words uttered or things done which embarrass another or put him in fear may be valued in certain kinds of plates, or in token articles of iron. Restoration of balance in this sense is secured by furnishing a 'fine' (e.g. *pemalu*, *chakap*, *pepat*, *nusi rita bulak*), by making good the loss with something of equal ritual value.

The fine in such cases is more than a mere apology, to allay personal feelings of anger or desire for revenge; it is a restoration of the balance within the group, made so that the group can continue to exist and preserve its relationship with all the powers.

An 'offence' against custom is therefore a disturbance of the balance within the community, an encroachment on its property whether tangible or not, and the significance of 'payment' of a fine lies in its magical or ritual effect of restoration and not in its causing the offender to suffer punishment and loss.

For this reason the western concepts of civil damages or distinctions between degrees of criminal intent do not really belong to the custom. Where they appear, they are a sign of an adoption of the concept and a mingling of *adat*.

This conception of adat has resulted in the 'codification' of ritual offences, as part of the (second division) Dayak *Tusun Tunggu* or Fines List.[24] The following examples include relatively minor ritual offences which come under the jurisdiction of the Tuai Rumah, who is empowered to fine up to the limits set out.

All offences listed in this part are to be dealt with by Tuai Rumah or Penghulu and the penalties customary in the locality are to be used. The maximum penalty for any one of them in money is $8.00: if *Tungkal*, $16.00. In each case there is *utai redak* and *genselan*.[25]

PEMALI UMAI. PADI-FARMS: FORBIDDEN ACTIONS

Quarrelling over boundaries (whoever first cuts trees, or appropriates more than formerly allotted to him).
Disturbing (a boundary) the place where the first (ritual) cutting has been done on a new farm, or appropriating it.
Quarrelling in another's farm.
Stealing anything planted in a farm.
Lying down in a farm during planting.
Incest: passing through another's farm before the 'fine' is paid (and therefore while still a wrong-doer).
Carrying a dead animal through a farm if the animal is not covered.
Breaking through into a farm or disturbing the mark banner where a ceremony has been held to remove evil spirits.

HOUSES: FORBIDDEN THINGS

Disturbing the ground that has been (cleared and) trodden down for a house.
Leaving a house unroofed.
Causing a disturbance in a house that is in mourning (playing music, wearing fine clothes, gathering together in a crowd, raising voices are all forbidden except they be much restrained).
If a lodger or a visitor dies, or is sick on arrival and anyone else dies in the house, the host incurs a fine.
Searching a room, or entering a room when the occupants and owners are not there.

Bringing a corpse up to a house.

OTHER FORBIDDEN THINGS

Snatching anything from anyone's hands.
Stealing a dried head (*antu pala*).
Telling lies or spreading false news or gossip.
Disturbing any of the things used at a Festival of the Dead (basket of food, 'house', bamboo cup).
Cooking a meal at the landing place of a farm while carrying a corpse for burial.
Allowing fire to damage a grave.
Any forbidden action omitted from these lists which is recognised and requires a fine to remove the evil, may be dealt with by the imposition of a fine of not more than 16 katis.
There are fines relating to 'looking after' the dead in certain circumstances: these fines differ from place to place and local custom should be followed.

In addition, the more serious pemali in the Second Division are dealt with by the Tuai Rumah or the Penghulu. These include, for example, adultery, claims for paternity and even incest to which the Penal Code (section 377A) does not apply. In this case half the total fines payable go to the Government and half as *plasi menoa*[26] to the community.

Similar provisions apply in the First Division also in respect of the Land Dayak.[27] It is notable here that Richards, in his introductory summary,[28] draws attention to a possible reason for the reservation of pemali offences to local settlement rather than to the official judicial machinery. He proposes that for the Land Dayak this may be the result of close contact with a strong religious force — in this case Islam. The retention of pemali problems within the Land Dayak community is thus attributed to a reluctance to let an official of another religious persuasion have anything to do with them. This may also be the case so far as the Iban are concerned, though here it is more a result of a conscious colonial policy in leaving matters of 'religious custom' to indigenous tribunals. Thus, the regulations on public order in the history of Sarawak have reserved jurisdiction to the native adjudicator though the jurisdiction of the official court, in this case the Native Court, has never been totally excluded. In addition, documents such as the *Tusun Tunggus* are taken as guides which set out general propositions. They are never regarded as binding, especially in ritual matters and the discretion of the local Tuai Rumah or Penghulu is always preserved. The enabling legislation is set out opposite.

The Native Courts

A number of ordinances have reference to various parts of Dayak adat, particularly in respect of land. These are dealt with in a later section and we are concerned here solely with the Native Courts Ordinance of 1955.[29] The act draws a distinction as to the sorts of (native) law to be applied in the Native Courts. Section 2 provides as follows:

'native system of personal law' means the customary law applying to any community, being a community forming the whole or part of any native race specified in the First Schedule to the Interpretation Ordinance; Cap. 1.

'system of personal law' means the system of personal law recognized by the general law of Sarawak as being applicable to the members of any racial, religious or other community because they are members of such community, and includes any rules or customary law of such system which may refer the determination of any matter to another system of personal law.

The classes, constitution, jurisdiction, penalties and appeals relating to the Native Courts are set out in Sections 3–7 as follows:

Classes of Native Courts

3. There shall be the following Native Courts of original jurisdiction—
   (*a*) the District Native Court;
   (*b*) the Native Officer's or Chief's Court;
   (*c*) the Headman's Court.

Constitution of Native Courts

4. (1) Without prejudice to the provisions of subsection (6), the constitution of Native Courts shall be as follow —
   (*a*) the District Native Court shall consist of a Magistrate of the First Class, a Native Officer and two assessors;
   (*b*) the Native Officer's or Chief's Court shall consist of a Native Officer or Chief and two assessors;
   (*c*) the Headman's Court shall consist of a Headman and two assessors.

(2) In any case in which the native system of personal law applicable is the law of a particular community, the Headman or Chief presiding shall be a member of that community.

(3) Subject to the provisions of this or any other written law, every case shall be heard in the lowest court which is competent to try it.

(4) A Native Court shall not be competent to try any case involving a breach of native law or custom if the maximum penalty which it is authorised to pass by virtue of section 6 is less severe than the minimum penalty prescribed for such offence.

Power to impose penalties

(1) The following penalties may be imposed by the courts specified respectively —

(*a*) District Native Court	Imprisonment not exceeding two years and a fine not exceeding two hundred dollars;
(*b*) Native Officer's or Chief's Court	Unless specially empowered under sub-section (2) or (3) imprisonment not exceeding six months and fine not exceeding one hundred dollars;
(*c*) Headman's Court	Fine not exceeding fifty dollars.

Cap. 58.

(2) A Native Officer or Chief who has been appointed a Magistrate may, when sitting in a Native Officer's or Chief's Court exercise the powers which he is entitled to exercise under the Criminal Procedure Code.

Cap. 51.

(3) Whenever any native system of personal law is varied by any notification issued under the provisions of the Native Customary Laws Ordinance, such notification may, notwithstanding the provisions of paragraph (*c*) of subsection (1), provide—

(*a*) for the imposition by any Headman's Court of a fine not exceeding one hundred dollars; or

(*b*) for the imposition by a Penghulu's Superior Court of a fine not exceeding two hundred dollars.

(4) Nothing in this section or in section 5 shall empower a Native Court to try a case which, under the Malay Undang-Undang, the Tusun Tunggu or any other customary law by whose custom the court is bound, it is not empowered to try.

Cap. 51.

(5) If the Governor in Council is satisfied that the pecuniary penalties from time to time sanctioned by any native system of personal law for the appropriate Native Court are greater than those sanctioned by this Ordinance, or if he is satisfied that the imposition of increased pecuniary penalties approved under the Native Customary Laws Ordinance or any enactment replacing the same may be entrusted to any Native Court under the Native Customary Laws Ordinance, he may by order signified in the *Gazette* empower the appropriate Native Court or such Native Court as he may deem appropriate to impose such greater pecuniary penalties, subject to such limitation as to amount or otherwise as he may deem fit to impose.

Appeals

(1) An appeal shall lie at the instance of any party aggrieved by the decision of any Native Court.

(2) Such appeal shall, if made from a Resident's Native Court, be lodged with a Resident and, in every other case shall be lodged with the District Officer within whose district the Native Court, the decision of which is challenged, exercises jurisdiction, or with such other person or

body as may be prescribed by rules made under section 19, and shall state the grounds of appeal:

Provided that —

(*a*) where no grounds are stated, the Resident, District Officer or such other person or body with whom the appeal is lawfully lodged shall endeavour within the period allowed for appeal to ascertain and record the grounds upon which the appeal is made; and

(*b*) save in so far as any rules made may prescribe to the contrary effect, a District Officer may, as regards appeals from any court in his district subordinate to a District Native Court, authorize any other person or persons to receive appeals and to exercise the functions devolving under this subsection on a District Officer or, alternatively, to receive appeals and transmit them to the District Officer.

(3) Such appeal shall be made within thirty days of the date of such decision, or within such further time and upon such terms as the court to which appeal lies may in any particular case allow, and may be made either verbally or in writing and either personally or by proxy.

(4) It is hereby declared that no proceedings in a Native Court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared void upon appeal or revision solely by reason of any defect in procedure or want of form, but every court exercising powers of appeal or revision under this Ordinance shall decide all matters according to substantial justice without undue regard to technicalities.

Provision is also made for a Native Court of Appeal (sections 8 & 9) as well as for an appellate court other than the Native Court of Appeal to investigate upon its own motion any cause heard in an inferior court. One of the most interesting provisions in the Ordinance is section 13 which sets out the principles to be applied in determining whether or not any person has changed from one personal law to another. The section reads as follows:

Special jurisdiction of a Chief's Court

Cap. 81.

13. (1) Without prejudice to section 5, a Chief's Court shall have power to hear and determine —

(*a*) for the purpose of section 9 of the Land Code, the question whether any non-native has become identified with the native community to which the officer presiding in such Chief's Court belongs, and subject to the native system of personal law thereof;

(*b*) the question whether a person who is subject to a particular system of personal law (whether native or otherwise) has become or became,

by virtue of subsequent events, or by conduct or mode of life, subject to a different personal law, being the personal law of the Chief's community; and

(*c*) the question whether a person subject to the personal law of the Chief's community ceased or has ceased to be so subject.

(2) In determining any question under subsection (1) —

(*a*) a Chief's Court shall be entitled to take into consideration public opinion in the Chief's community, even where it conflicts with a strict application of the system of personal law of such community, and, unless such community is a Muslim community, may disregard the fact that the person in question was or is a Christian and that some modification of the system of personal law of such community is, was or may be required on that account;

(*b*) the testimony of responsible persons in the community, and the opinion of the assessors or of the Tuai Rumah assisting a Chiefshall be acceptable evidence as to the public opinion of such community; and

(*c*) no person who is not a Muslim may be declared to have become identified with or to be subject to the personal law of a native Muslim community.

Any decision made binds only the parties involved and is subject to appeal in the normal way. This provision is unique in Malaysian legislation and reminds one of the Dutch colonial regulations in Indonesia providing for transfer from one law group to another in various cases.[30] A further modern example, although expressed in judicial precedent, is that line of cases in India dealing with affiliation to caste and scheduled tribe.[31]

A final point of interest in the Sarawak Native Courts Ordinance is the provision in section 23 which clearly states that the jurisdiction of any court established under the Courts Ordinance[32] shall not be derogated from by the Native Courts Ordinance. Further, the jurisdiction conferred by this ordinance shall not exclude the jurisdiction of any court established under the Courts Ordinance.[33]

Rules of Dayak Adat

With this essential background as to the nature of Dayak adat and its applicable scope as defined by the legislature we can now go on to look at the substantive adat rules which have exercised the formal judicial system. This section is basically concerned with transactions involving land and other forms of property including, as a necessary adjunct, questions which relate to adoption, marriage, divorce and testamentary disposition as these affect inheritance.[34]

As to the distribution of property on divorce, Hermanus Assan[35] gives the following information relative to the Iban of the Third Division. Acting on the classification of property into movable and immovable, he notes that generally equal shares are allotted to all those resident in the bilek-family. However, one caveat needs to be added here in respect of this particular account. This is that although the author begins by classifying into movable and immovable, he does not show the relevance of these categories (if any) to the Iban of the Third Division. Indeed, he immediately begins to speak of *real* and *personal* property, a classification based on the (English) law of real property and founded in the mode of action for recovery. This has no conceivable relationship to adat even in so far as this is affected by statute. The latter does not prescribe such a classification, all the legislation directs the application of adat and this is in fact what the courts do apply. The importance of this fact cannot be overemphasised. Adat is primarily a matter for the courts in the last resort but the great majority of adat disputes never get this far. After all it costs a good deal of money to commence litigation! However, in the more informal forum of the Tuai Rumah recourse is had to documents setting out 'rules' of adat and it is particularly important that artificial distinctions such as 'real', 'personal', 'movable' and so on be avoided. The function of such fora is not the formulation of legal nicety but the immediate and cheap settlement of disputes.

These problems are not apparent in Phillip's classic account[36] of inheritance among the Dayak of Saribas. Here the classification adopted is reminiscent of the Malay usage into *barang lama* (inherited property) and *barang bahru* (acquired property).[37] By the use of actual example the author shows that the general principle of bilek-membership provides a fundamental right to receive property, but the classification between inherited and acquired is equally relevant in determining *quantum* (if any) in particular circumstances. This use of native categories is illuminating and necessary to provide an accurate summary of the adat. In particular, when put against the regulations drafted by the àdministration for registration and transfer of land office titles, it shows the inadequacy of in-built English law assumptions. In this case, that title stating individual ownership is totally distorted in the bilek-family context. The result, as Phillips notes,[38] is at least distortion of the land office records and at worst a confrontation between adat and [redacted] judicial bureaucracy despite the clear statements by gove[redacted] to the preservation of adat (see the cases below).

Another form of local commentary is that given by Sandin[39] on the Iban. This is merely a collection of localised adat propositions unrelated either to a wider ethnographic description or to legal materials of the sort we have been considering. Its value, therefore, is very limited.

The material which we have considered so far gives a picture of a 'static' law where principles and rules are fixed and the wider social and economic background is constant. This of course is misleading and later adat accounts bear this out as well as illustrating the sensitive areas of stress and change. An early example and still one of the best accounts is given by Richards[40] in his discussion of the disposal of and transactions in land rights. One of the most important aspects of this is the increasing extent of the bilek-families' and even an individual's rights over land use by the planting of a permanent crop which has no place in the traditional scene. Rubber and pepper are examples, and the land upon which these (semi-) permanent crops are grown tends to become dead (*mati*) so far as the longhouse is concerned. The likelihood of this is strengthened when, as often happens, land under a permanent crop is sold. Another occurrence is where an outsider (usually Chinese) gains control by a form of long lease over *menoa* land under some sort of permanent crop.[41]

A further distinctive problem arises in those areas in which the land is coming to be used more often and continuously either because of shortage of virgin forest or because government regulation prohibits exploitation for some reason. In this situation, where land is scarce and likely to be disposed to an outside (Iban) purchaser, members of the longhouse community have a right to take precedence. The problem of course is that the 'home group' may not be able to afford to match the outsider's price.

As a possible defence both against this problem and against the permanent crop situation the principle of *terang*, or consultation, is becoming more firmly insisted upon. This, which is basically the principle that all dealings must be public, has always been a feature of Iban adat, but in its contemporary form it is taking one of two aspects. Where its breach can be shown by someone sufficiently able, respected and affluent enough to bring it to the Magistrate's attention, it may invalidate a prior disposal of land. Unhappily and more commonly, on the other hand, the Tuai Rumah, as the representative of the community, may take fees for making a settlement without reference to all those persons who should be

notified of the transaction. Such a proceeding tends to give legal coloration to what is an illegal act.

A further complication on the same general theme arises over the issue of compensation (*Tungkas Asi*). Within an Iban community when land is borrowed a token payment is usually made for, among other reasons, a ritual preservation of the bond between the lender and the land. This payment, however, is now becoming confused with sale or rent on a market value basis. The position is exacerbated when the Government seeks to acquire land for other use. The problem is the gap between the concept of token payment and sale for a surveyed value. In addition there may be a variety of customary rights over a specific piece of land not covered by registered title.

In addition to these topics, Richards[42] also draws attention to the contemporary practice of making wills (see below) and to the much more serious problem, inherent in what has gone before, of complete alienation despite legislation prohibiting this. Nevertheless, alienation does occur in forms ranging from long lease, pledge, prepaid rent, to paid labour and many of the intermediate processes are not registerable in any form.[43] This brings us directly to the question of the land regulations of Sarawak.

Sarawak Land Laws and the Dayak

The early history of land laws in Sarawak is a history of the Rajah's land regulations.[44] In the main, early orders made no detailed provision for land registration but merely provided for the payment of rents and for the possibility and desirability of fee-simple purchase. A point of interest, however, is that the definition of state land as 'all unoccupied and waste lands the property of Government'. There is no reference here to State boundaries. By 1920, however, under Order VIII of that year, the old personal orders of the Rajah were cancelled and part 5 of the Order made provision for native occupancy under adat, including the registration of claims where possible. In the early 1930s two more orders were put out, L–2 (Land) 1931 and L–7 (Land Settlement) 1933, in which Torrens principles of land registration were fully and rigidly drafted, even to the extent of stating that failure to register title might result in subsequent loss of title. The problem was that Torrens Registration depends upon an accurate triangulation survey and in the 1930s this did not exist for the bulk of Sarawak land. Local attempts under Secretariat Circular 12/1939 were,

however, made to overcome this by the setting up of village committees to define boundaries, but the programme was upset by the Japanese occupation. Immediately after the war Orders L–2 and L–7 were discontinued and in 1948 the first of the revised land Ordinances was put out and the basic law is now found in the Land Code.[45] This is a consolidation largely founded on previous Sarawak legislation and makes provision for Torrens Registration on patterns drawn variously from New Zealand, Malaya and Victoria (Australia). Land falls into the following classes:

a. Mixed Zone Land; which may be held without restriction
b. Native Area Land; to be held by natives only
c. Interior Area Land; this is land to which a title may not be held, although, subject to a permit, native customary rights may be established over specific areas.

The legislation has been criticized by authorities[46] who see it as not conforming to native ideas on occupation and use of land. The fundamental problem is the distinction in concept between occupation and title, or between interests unknown to Western law and interests which that law will regard as enforceable or, in the case of the Torrens system, as registerable interests.

The important provision of the Land Code so far as Dayak adat are concerned are contained in sections 5, 6, 41 and 42.

Native customary rights.

5. —(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is Crown land any person in occupation thereof shall be deemed to be in unlawful occupation of Crown land and section 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are —

(*a*) the felling of virgin jungle and the occupation of the land thereby cleared;
(*b*) the planting of land with fruit trees;
(*c*) the occupation or cultivation of land;
(*d*) the use of land for a burial ground or shrine;
(*e*) the use of land of any class for rights of way; or
(*f*) any other lawful method:

Provided that —

(i) until a document of title has been issued in respect thereof, such land shall continue to be Crown land and any native lawfully in occupation thereof shall be deemed to hold by license from the Crown and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

Native Communa Reserves.

6. — (1) The Governor in Council may by order signified in the *Gazette* declare any area of Crown land to be a Native Communal Reserve for the use of any community having a native system of personal law and may, by such order or by subsequent order, declare that the customary law of such community in relation to the acquisition, transfer and transmission of rights and privileges in or over land, and in any building or other structure erected therein, shall apply with such modifications as may be specified or provided for in any such order.

(2) Save in so far as the contrary may be specified or provided for in any such order or by this section, rights in any land declared to be a Native Communal Reserve under subsection (1) shall be regulated by the customary law of the community for whose use it was declared to be reserved.

(3) Notwithstanding subsection (2), but without prejudice to subsections (4) to (7) inclusive, any such land shall continue to be Crown land, and the native community for whose use it was reserved or any member thereof acquiring any rights therein shall hold the same as a licensee from the Crown, and if, by virtue of the provisions of this section (including the provisions of any order made under subsection (1)), any individual native customary rights become established, the issue of any document of title in respect thereof shall be in the absolute discretion of the Director:

Provided that the Governor in Council may of his own motion or upon petition review and confirm or amend any exercise of such discretion.

(4) If the Governor in Council is satisfied that any part of any area comprised in any declaration under subsection (1) is no longer required as a Native Communal Reserve and that the provisions of this subsection may be applied without causing injustice or oppression, he may by order signified in the *Gazette* declare that such part shall cease to form part of such Native Communal Reserve, and as from such date, if any, as from which such declaration is expressed to come into effect, or, if no such date is expressed, than as from the date of publication in the *Gazette* of any such order, such part shall be at the disposition of the Crown as free and unencumbered by any right, privilege or equity in respect thereof as if it has never been declared to be a Native Communal Reserve.

(5) The Governor in Council may, if he considers that the settlement provisions in Part V should be applied to the whole or any part of any Native Communal Reserve, by order signified in the *Gazette* so direct, and the Director shall in such case proceed accordingly.

Cap. 27. [1948 Edition]

(6) The provisions of this section shall apply also to native land reserves constituted under section 91 of the former Land Ordinance and Native Communal Areas constituted under rules 19 of the Land Settlement Rules in like manner to all intents and purposes as if they had been constituted by order under this section, save that if the notification issued under that section or that rule, as the case may be, has not specified for which community any reserve was constituted the same shall be deemed to have been reserved for the community which has in fact made use of the same or if any dispute or question arises, for the community for which the Governor in Council may by order issued under subsection (1) subsequently declare it is to be deemed to have been reserved.

(7) In any case in which this section applies, the question as to whether any person, whether or not such person is a member of the native community for whose use the reserve is or is deemed to be constituted, may exercise any rights or privileges within such reserve shall be determined by the customary law of such community and by such orders, if any, as may have been made under this section, and, save to the extent that any such person may be able to justify his occupation of any land comprised within such reserve, he shall be deemed to be in unlawful occupation of Crown land and Section 209 shall apply thereto.

Native holdings.

41. —(1) Any native, being a male adult or a widow, spinster or divorced wife to whose support no male is directly contributing and who does not hold a document of title or an interest therein granted under this section or under any similar provision in any Ordinance repealed by this Code or in any Order of the Rajah affecting land, may, on application to the Superintendent, be granted a lease subject to the provisions of this section for a term of ninety-nine years of one parcel of Crown land of not more than four acres, free of all charges and on the following conditions —

(*a*) subject to the provision of this or any other written law any crops may be planted;

(*b*) except as if provided for in subsection (3), no such parcel shall be capable of being taken in execution or otherwise rendered available by any form of judicial process for the payment of the native owner's debts or liabilities, whether in favour of the Crown or in favour of any other person, or shall be assets in his bankruptcy or pass to the assignee or trustee in the bankruptcy;

(*c*) if the parcel is granted to a male after his marriage, then the lease shall be issued in the name of the husband and wife jointly;

(*d*) except as if provided for in subsection (3), the parcel shall be indivisible and no transfer, charge or sub-lease for any term whatever shall be registered or valid;

(*e*) a proprietor of one such parcel shall be incapable of acquiring any share in another such parcel except by inheritance or in accordance with the provisions of subsection (2);

(*f*) the land may at any time be surrendered to the Crown.

(2) Parcels and undivided shares in parcels under this section may be inherited by natives according to custom provided that the co-proprietors of any parcel shall at no time number more than five. If any heirs or beneficiaries are excluded from registration, the Probate Officer shall arrange for the heirs or beneficiaries selected to pay to those excluded compensation for the loss of their shares in the parcel.

(3) The Resident, if satisfied that it is to the benefit of the proprietor and his heirs, may order that the parcel shall cease to be subject to this section or may order the transfer or sub-lease of the whole or part of the parcel. Any order made by the Resident under this subsection shall be sent to the Registrar and noted by him accordingly on the document of title and on the Register.

(4) In any case where a proprietor of land to which this section applies has left Sarawak and has failed to appoint an attorney to deal with his estate or interest, the Director, after giving to such person at least three month's notice, shall be deemed to have power to deal with the estate or interest on behalf of the person entitled thereto.

(5) In this section 'proprietor' means a registered proprietor.

Sago land.

42. — (1) The Superintendent may in his discretion grant a lease to any native, or to any other persons who has been ordinarily resident in Sarawak for a period of five years out of the seven years immediately preceding the grant, of an area of land suitable for the cultivation of sago and not suitable for the cultivation of wet padi.

(2) So long as the person in beneficial occupation by way of lease or sub-lease of any area of land to which this section applies is a native, no rent, premium or other charges shall become or be payable to the Crown save in respect of any area in excess of fifteen acres held under the same title:

Provided that any person, other than a native in beneficial occupation as aforesaid, shall be liable to the Crown for such rent, premium and other charges as the Superintendent may, having regard to any rules applicable made under section 213, assess.

(3) Subject to subsections (1) and (2) and to the implied condition imposed by virtue of this subsection that any areas of land alienated under this section shall not be used for any purpose except the cultivation of sago, and that it shall not be cultivated except in accordance with the usual methods for cultivating sago in a proper and efficient manner, and

that upon breach the Crown may re-enter in accordance with the provision of section 33, such land may be freely re-alienated by way of transfer, sub-lease, charge or other disposition, other than such a license or other disposition to a person who is not a native as would enable such person to cultivate and take the produce of such land without becoming liable for the rent and other charges due to the Crown.[47]

The data adduced in this and the preceding sections leads us to the final aspect of Dayak adat: its treatment in the courts of Sarawak.[48] It is in the area of judicial decision that the various forms of adat discussed earlier find their definitive expression.

Dayak Adat and the Courts[49]

A primary question of some importance in respect of the judicial treatment of adat is that which concerns the jurisdiction of the courts established under the Native Courts Ordinance. Section 5 of this Ordinance provides that 'Native Courts shall have jurisdiction, concurrent with such other courts as may be empowered' to try a variety of topics. The exact scope of this provision was discussed in *Mandi a/k Kerbau* v. *Tima a/k Landa*[50] where the question at issue was whether or not the Native Court had jurisdiction to determine on inheritance. It was held that it did not because inheritance was not a topic specified in the topics mentioned in section 5. In other words, the jurisdiction of the Native Courts is confined to matters mentioned in the statute and even here it seems that the determination of the scope of this statute is a matter for a court established under the Courts Ordinance.[51] Native Courts are thus special courts of limited jurisdiction.

A later decision tending to the same conclusion is *Nyaring a/k Malong* v. *Jilai a/k Mudai*[52] where a question as to capacity to exercise jurisdiction was raised. Here, a Tuai Rumah had conducted a Headman's Court without the prior approval of a Magistrate of the First Class as required by section 2 of the Native Courts Ordinance. It was held that all proceedings were therefore null and void. This is an example of the strict application of statute in respect of the Native Court; a further example is to be found in the recent case, *Manggai* v. *Government of Sarawak*.[53] Here the right to appeal through the Native Court hierarchy was denied on the basis that the applicant was out of time. In other words, the technical provisions of the introduced law prevailed over whatever substantive adat rights the applicant may have had. A similar conclusion was reached in the much earlier case, *Penghulu Jarraw* v. *Jubin a/k*

Marin.[54] The plaintiff was a penghulu in the Third Division and had settled a divorce case according to adat, including the division of matrimonial property. He claimed an award '*baso kaki*'[55] for his services. This was refused by the court on the ground that the plaintiff was acting in a judicial capacity and hence any award baso kaki must be illegal as it would allow an interest in property subject to adjudication. A second ground for the decision refusing the plaintiff's claim was that, according to a codification of Third Division adat made in 1936, there was no mention of baso kaki as an institution of that adat. In other words, the adat was taken to be definitively set out in the 1936 compilation.

As we saw earlier in this chapter one of the characteristic forms of Dayak adat is the codification of local rules made primarily for administrative purposes. The status of any such code in judicial proceedings may be said to be at least strongly persuasive and the courts are unlikely to ignore the rules set out therein. In *Madi a/k Lenggai* v. *Lulai a/k Lenggai*[56] a claim for property was made on the basis of an institution called '*lanting*' i.e. the property kept by an elderly person on the disposal of the rest of his property, and to be inherited by whoever cares for that person at the end of his life.[57] The plaintiff was a Sebuyan Dayak amongst whom, according to expert assessors, the term 'lanting' does not occur. On this basis the claim was dismissed.

These remarks bring us to the more general question of inheritance. On this subject the cases are clear and give effect, wherever possible, to the rules of Dayak adat where these are satisfactorily proved. In *Indun a/k Ugu* v. *Dendang a/k Saing*[58] the adat rules on the distribution of the property of an Iban dying without issue were applied. Property classified as 'barang lama', i.e. acquired before marriage, was transmitted to the deceased's sisters. That classified as 'barang bahru', i.e. acquired during marriage, would normally be transmitted to the widow for the purpose of 'erecting a monument to her deceased husband'. The widow did not do this but remarried instead, and as a consequence this share passed to the sisters of the deceased. In a further case, decided in the same year, *Egah a/k Igu* v. *Inggol a/k Jegong*,[59] a claim by the issue of a first marriage to a share in property acquired during a second marriage was refused because he was not a member of the bilek-family of the second marriage at the time the property in question was being acquired.

Similarly, the courts have given effect to the adat rules on adoption in all cases[60] which have come before them. It is notable in

these cases that the adat is applied as it stands and is unaffected by the technical requirements of the general law on adoption. A similar position exists in respect of the capacity of a Dayak to make a testamentary disposition. In the leading case, *Sat a/k Akum* v. *Randong a/k Charareng*,[61] the following principles were set out. First, a Dayak can make a valid written will and dispose absolutely of property which he acquired during his lifetime. Second, any property over which he has control but which is subject to restriction either by legislation or by adat as to disposition cannot be subject to testamentary disposition in derogation from such laws. The judgment does not mention whether or not any will must conform to the statutory requirements as to formal validity and this remains uncertain. This is, however, an area in which it may be predicted that the introduction of English law principles seems more or less inevitable.

The introduction of such principles has been characteristic, at least to some degree, in the decisions given on land questions, specifically on customary land tenure. This, of course, has been more or less inevitable in the light of those provisions (set out earlier) of the legislation which directly affect Dayak land holdings. However, in the period preceding state-wide land legislation, it is probably true to say that orders affecting land tended to be declaratory of Dayak adat and for purposes of administration alone. This is clearly the effect of an early reported case, *Udin a/k Lampon* v. *Tuai Rumah Utom*,[62] which gave effect to the adat provision that no individual title can be got to communal farming land which is at the disposal of the Tuai Rumah of the longhouse. Any Dayak who removes himself from the longhouse area thus loses any rights to utilize such land and it is never open to him to sell or transfer any such land. These principles were contained in an Order of the Rajah of August 1899 and although the Order was no longer on the statute book at the time this decision was given the principles contained therein remained because the Order was said to be merely declaratory of the adat.

These principles were again adhered to in the later case, *Sumbang a/k Sekam* v. *Engkarong a/k Ajah*,[63] with the addition of a proviso that if an individual holder of rights in communal land removes himself from the longhouse he may retain his rights so long as he remains within reasonable farming distance of the land. In other words, rights to cultivation depend upon use coupled with residence. This principle of adat has been consistently demanded by the courts and any form of occupation licence is always subject to cultiva-

tion.[64] Further, it has been recently decided that administrative boundaries have no relevance to the creation of customary rights nor to their exercise. Such rights can, however, be affected by agreement between the parties.[65]

Summary

From this brief summary of the cases it is clear that the courts have seen their function as one of giving effect to Dayak adat to the fullest extent of their capacity. This is true also of the legislature where statute is characteristically enabling in content and intention. A good deal of judicial power has been left in the hands of the traditional Dayak authorities and the co-operation of such authorities has also been sought, without exception, in the compilation of the adat rules of various districts. The reduction of adat rules to writing, primarily for administrative purposes, has a long history in Sarawak and this, combined with the co-operation of adat authorities, has to a large extent avoided the misunderstandings so characteristic in other parts of Malaysia. The courts have had the benefit of this and of anthropological data, and with the participation of the Dayak in the judicial process have preserved to a great degree indigenous adat principles. There have been no assumptions by the courts as to what is or is not 'law' in any case, the courts being content to administer that which is recognized as adat on the basis of local evidence. Nor have the courts ever attempted to import English law notions of 'custom' as being relevant to the proof and existence of any adat.

It is clear from what has gone before that the official attitude to Dayak adat may be characterized as a protective policy. Even the land classification adopted in the state is based upon a distinction between 'native' and 'non-native' land. But we must now ask, to what extent is protection either necessary or desirable in the light of the need for economic development in the state? Further, can one distinguish social need from the political necessity for development? No clear answer can be returned to these questions although they were discussed in detail in 1962. In that year an *ad hoc* Land Committee proposed that the present Land Code be replaced by four Bills to resolve land matters.[66] In the event the Bills were shelved in 1965 and nothing more has been done in the way of abolishing the present land classification. This situation cannot, however, persist for much longer and one can foresee the abolition of adat restrictions in the name of development. We must be quite clear

here as to what is meant by land 'development' in the Sarawak context. The term refers primarily to the introduction of individual ownership of land together with power to transfer for value to any individual in a contract of sale and purchase. In other words, restrictions as to transfer based either upon land classification or personal qualification are felt to be incompatible with the development of freehold farming units geared to a cash economy. The law, as it stands, preserves the restrictive position by giving effect to an adat which does not know transactions in contract necessary for development in the sense just outlined. It will come as no surprise to learn that the law as it stands is already being avoided especially on this question of transfer.[67] One commentator even sees the 'law itself tending to fall into disuse, if not disrepute, and the wishes of parties to illegal transactions tending to become paramount'.[68] It is obvious, therefore, that some reform is necessary but the form which this will take is as yet unknown.

1. See chapter 5 below.

2. See chapter 3 above and also Abang Yusuf (1966).

3. Up to the time of the Japanese occupation of Sarawak in 1942, the history of Sarawak is largely the history of the Brooke family who held office as Rajahs of Sarawak from 1841. After the defeat of the Japanese in 1945, the state, by Act of Session, became a Crown Colony and later, in 1963, a constituent state of Malaysia. For the detailed political background see Allen, 1968: 144–72. For a short description of the Constitution of Sarawak in the pre-war period see Stirling Boyd (1936) and Sheridan 1961: 115–50.

4. Section 2 of the Sarawak Application of Laws Ordinance. C.2 revised laws of 1958.

5. cf. *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381.

6. [1928–41] S.C.R. 60.

7. These principles have been defined in, for example, respect of the Chinese where it was stated that the Court would apply Chinese law if (a) that law was expressly regulated by a Sarawak Ordinance; or (b) when that law was expressly regulated by rules made under an Ordinance; or (c) where the law was recognized expressly or impliedly by in a Sarawak Ordinance. cf. *Chan Bee Neo & ors.* v. *Ee Siok Choo* [1947] S.C.R.1. and *Wong Teck Giak & Anor.* v. *Ting Ni Moi* [1950] S.C.R.1. & 39. On the other hand, jurisdiction in Chinese cases has been taken on none of these grounds, cf. *Liu Kui Tze* v. *Lee Shak Lian* [1953] S.C.R. 85. and, in a case from Brunei, jurisdiction has been refused on the ground that no legislation specifically confers such jurisdiction. cf. *Lim Sien Yun* v. *Soong Ah Kaw* [1960–63] S.C.R. 105.

8. In Sabah the Procedure Ordinance of 1926 (No. 1), made when that territory was protected North Borneo, provided that claims on intestacy should be determined by the racial law of the deceased. 'Race' has been judicially defined as referring to the various communities which make up the inhabitants including both indigenous and immigrant communities. cf. *Matusin bin Simbi* v. *Kawang binti Abdullah* [1953] S.C.R. 106.

On the more general question of Islamic law and Malay adat in East Malaysia the cases show that the Court is willing to admit local variation either in adat alone, or in adat varying Islamic provisions, cf. the following cases: *Abang Hj. Zaini* v. *Abang Hj. Abdulrahim & Anor.* [1951] S.C.R.1. on the definition of 'Mohammedan law of inheritance' which was held to mean Islamic law as modified by local custom: *Mahadar bin Datu Tuanku Mohammed* v. *Chee (f)* [1928–41] S.C.R. 96 where a Malay *Undang2* was accepted as stating an adat; *Matusin bin Simbi* v. *Kawang binti Abdullah* [1953] S.C.R. 106, *Men binti Lockman* v. *Dan bin Dol* [1952] S.C.R.13, *Mohidi bin Ana* v. *Spiah bt. Hj. Samat* [1951] S.C.R. 22, *Serujie bin Zin* v. *Sanah bt. Hj. Amin* [1953] S.C.R. 40, *Sheripah Unei* v. *Mas Poeti* [1949] S.C.R. 5, on local adats and their relation to Islamic law. See generally Chapter 3 above.

9. *Malaysia Yearbook*, 1968/69: 22–3. For a map showing the distribution of the Iban cf. Freeman, 1970: 131.

10. Sarawak is divided into administrative divisions numbered consecutively from 1 to 5. Each has a Resident who is responsible for the administration in the districts which make up his Division.

11. cf. Freeman, 1970: 9.

12. For a detailed analysis cf. Freeman, 1970: 9–14.

13. We return to ritual when we come to consider 'Dayak adat' (below).

14. cf. Freeman, 1970: 41–55.

15. As Freeman (1970: 95–102) shows, the *bilek-families* of an Iban longhouse are inter-related by a complex of cognitive ties.

16. The questions of migration and residence as establishing access rights are among the subjects most commonly litigated by the Iban. (See below.)

17. It is permissible for one man to hold both offices.

18. His role here must not be confused with that of *Penghulu* who is a government appointed official whose duties in regard to an administrative district is merely the translation of the administrative directive to the people. He has no competency in adat, though it is of course not unusual to find a *Penghulu* who is also a *Tuai Rumah.*

19. For a description of the *Tuai Burong*, cf. Freeman, 1970: 116–25.

20. cf. Wensink & Kramers, 1941: s.v. ada, adatrecht.

21. cf. Hooker, 1970: xi.

22. In addition to these meanings there are a variety of named adats from all parts of the Indonesian archipelago, each of which exhibits peculiarities of its own. cf. Labberton (1933), Hooker (1970).

23. cf. Richards, 1963: 1–2.

24. The status of the *Tusun Tunggu* in law is that it is a guide for the Magistrates who deal with Dayak cases in the Native Courts, but it does not affect the powers and duties of a native court as laid down by the Native Courts Ordinance (c. 43) — see below.

25. *Genselan* (or *enselan*), a sacrifice or a payment to be made in advance of an action by way of propitiation or to avoid evil consequences. It is an avoidance rather than a penalty but may include public compensation.

Utai redak: small articles; describes the articles furnished in settlement of *genselan.*

26. Cleansing of the *menoa* (the area held and used by the *bilek-families* of a longhouse) to avoid evil consequences.

27. cf. Richards (1964).

28. ibid. ss. 9–10.

29. c. 43 revised laws of 1958.

30. cf. Schiller (1942–43).

31. cf. Galanter (1967).

32. c. 42 revised laws of 1958.

33. Other relevant ordinances include the Native Customary Laws Ordinance c. 51 revised laws of 1958 and the Guardianship of Infants Ordinance c. 93 revised laws of 1958, sections 20 and 22.

34. It should be understood that in what follows the data is of the sort which has been collected by administrative officials in Sarawak and agreed upon as to form and content by meetings of *Tuais Rumah* and *Penghulus*. Typical examples are provided by Hermanus Assan (1952) and Phillips (1954). To this extent, therefore, the contents are 'official'. Needless to say, these statements are confined and specific relative to named areas. The courts also, as we shall see, take note of this.

35. cf. Hermanus Assan (1952).

36. cf. Phillips (1954).

37. Terms used in West Malaysia are respectively *Pesaka* and *charian*.

38. cf. Phillips 1954: 128–9.

39. cf. Sandin (1968).

40. cf. Richards 1961: 30–54.

41. ibid. 33–4.

42. ibid. 48.

43. ibid. 49–54.

44. ibid. 6–9, 72–4 for a list of the Land Orders of the Rajah. See also 'Land Regulations of North Borneo 1885'. s. 26 in (1885) *Journ. of the Royal Asiatic Society, Straits Branch* 15: 158–63.

45. c. 81 revised laws of 1958. See also *Sepid a/k Selir* v. *R.* [1954] S.C.R. 36 on s. 108 of the Land Code.

46. cf. Richards, 1961: 11–12.

47. The following Ordinances were repealed by the Land Code:
   (a) the Land Ordinance (cap. 27 1948 Edition);
   (b) the Land Settlement Ordinance (cap. 28 1948 Edition);
   (c) the Land (Classification) Ordinance (No. 19 of 1955);
   (d) the Dealings in Land (Validation) Ordinance (No. 11 of 1952).

For a recent discussion on land development in Sarawak see Porter (1970). For comparative data on the land legislation of Brunei see Brett (1959).

48. cf. Sheridan, 1961: 132–4 for a description of the court system.

49. The cases cited are those reported up to the end of July 1971.

50. [1950] S.C.R.3.

51. c. 42 revised laws of 1958.

52. [1960–63] S.C.R. 316.

53. [1970] 2 M.L.J. 41.

54. [1951] S.C.R. 30.

55. A commission on a sliding scale according to the value of the property divided.

56. [1949] S.C.R.1.

57. cf. Richards 1963: 42.

58. [1953] S.C.R. 36.

59. [1953] S.C.R. 55.

60. cf. *Tandang a/k Analingkong* v. *Sendi a/k Nyanggau* [1953] S.C.R. 25. *Entinggi a/k Bano* v. *Dri a/k Ambok* [1953] S.C.R. 17. *Jati* v. *Ah Paw* [1964] M.L.J. 68.

61. [1957] S.C.R. 53. [1958] S.C.R. 104.

62. [1949] S.C.R. 3.

63. [1958] S.C.R. 95.

64. cf. *Laga* v. *Uging and Anor.* [1966] 1 M.L.J. 27, *Nyalong* v. *Supt. of Lands* [1967] 2 M.L.J. 249, *Injing* v. *Tuah and Anor.* [1971] 1 M.L.J. 115, *Abang* v. *Saripah* [1970] 1 M.L.J. 164.

65. cf. *Galau* v. *Penghulu Imang & ors* [1967] 1 M.L.J. 192.

66. 'Report of the Land Committee', 1962. (Published by the Sarawak Govt. Printing Office, Kuching 1963.)

67. See for example Richards, 1961: 11–12; see also above, 'Rules of Dayak adat'.

68. cf. Porter, 1970: 220.

5
CHINESE LAW

Introduction

CHINESE immigration into what is now Malaysia had long existed, but large numbers began to arrive only in the mid-nineteenth century and continued more or less unabated for the next fifty years. The immigrants came primarily from the labouring classes of South China and were encouraged to settle by the British who valued their industry. It was a consistent feature of colonial policy that the internal affairs of the Chinese community be interfered with as little as possible; to this end it was common for the administration of each community to be given to an appointed headman or 'Captain' who acted as a link between government and community and administered the laws and regulations of each community. In addition, and commonly connected to the institution of Captain China,[1] there were secret societies which had their own systems of internal regulations.[2] In the period after the new immigrant community began to settle permanently, clan, locality, language and business groups founded associations usually for welfare and benefit purposes. Each of these institutions represented attempts to transplant Chinese ways of regulating community affairs into a new environment. Even after the establishment of the formal court system in the colony and the outlawing of the secret societies the tradition of internal regulations persisted within the Chinese community. This tradition is still not dead[3] although to a large extent it has been rendered insignificant by the formal judicial system. Some authorities have seen this as not altogether a good thing, not just because of the alien nature of British institutions but also because these tended to destroy the institutions of self-government already developed or to turn them to undesirable uses. An example often quoted is that the secret societies were turned from their original benefit and protective functions to criminal activity.[4] The process has also been described in the following way:[5]

> The history of government of the Chinese by the British in Malaya may be described as a transition from indirect to direct rule. This is made

clear in the legal history of the Straits Settlements. The process was from rule by Chinese custom administered by Chinese headmen, to rule by English criminal law side by side with Chinese custom administered by British judges, then as the law was interpreted, to rule by the law of England, taking account of Chinese custom. The interpretation of the law meant progressive restriction on the operation of the custom of the Chinese. At the same time a body of statute law was growing up in the Colony itself which was further to restrict this custom.

The materials on which this chapter is based are the relevant statutes and judicial decisions of the territories, plus, in the case of the former Straits Settlements, a report on Chinese marriages (1926). A cautionary note needs to be inserted here with respect to Singapore and Malaysia. These states, as now constituted, share a legacy of common law but the respective histories of this law are dissimilar. Singapore and the present states of Penang and Malacca in Malaysia were once part of the colony of the Straits Settlements. The states of Perak, Pahang, Selangor and Negri Sembilan were once part of the Federated Malay States, and the remaining states of Malaysia were part of the Unfederated Malay States. The present federal states of East Malaysia, Sabah and Sarawak, were once respectively the colonies of North Borneo and Sarawak. The judicial histories of these areas vary and this has had important consequences for the development of Chinese law.

English Law and the Recognition of Chinese Law

The Straits Settlements (Singapore, Penang and Malacca)

These three settlements which came under the control first of the East India Company, later of the India Office, and finally of the Colonial Office, were provided with a series of charters known as Charters of Justice. The Charters (dated 1807, 1826 and 1855) provided for the setting up of courts and a judicial service; they also provided that the law in each of the settlements was to be English law and was to apply to Europeans and to natives in 'so far as the several religions, manners and customs of the inhabitants will admit'. The interpretation of this phrase and the decisions as to how far English statute applied in the colony have resulted in a series of cases which are well-known and need no further comment here.[6]

In addition to the provisions in the Charters, Chinese law has received a basis for its application through the use of private international law principles.[7] This is mainly illustrated in cases involving polygamous marriages, adoptions, and legitimations. In the ca

of marriage, the rule at common law has always been that marriage is monogamous.[8] However, the courts in the Straits Settlements have decided that since it was lawful for a Chinese domiciled in China to take a secondary wife, at least before May 1931,[9] then the Chinese as a whole are 'polygamous'.[10]

In respect of a husband's right over his wife's property, the common law gave certain specific rights.[11] But the courts in the Straits Settlements held that a marriage contracted between Chinese according to Chinese rites conferred no marital rights on the husband with respect to this wife's property.[12] So far as legitimacy was concerned this was determined by birth in lawful wedlock (common law) or by virtue of statute. But in the Straits Settlements the status of legitimacy was held to depend upon the law of China. Legitimation likewise depended upon the domicile of the father: in the case of a father possessing a Chinese domicile, legitimation by subsequent monogamous or polygamous marriage was possible.[13] Somewhat inconsistently, the courts have rejected legitimation by subsequent recognition.[14]

The application of private international law principles in the Straits Settlements was plagued by difficulties. By the very nature of the conflict, where one of the systems of law was unwritten or if written was subject to local modification, difficulties of proof were common. This difficulty was made greater by admitted local variations in Chinese law. Further, English conflict rules pre-supposed a relatively settled domicile and also the existence of a technical legal system not unduly affected by such matters as race or religion. Neither of these assumptions was fully justified in the Straits Settlements. This had led to some internal inconsistencies such as the recognition of legitimation by subsequent marriage but not by subsequent recognition.[15]

Finally the courts in the Straits Settlements have recognized Chinese law and custom on the ground of 'natural justice'. In the present context this appears to cover such matters as the interpretation of common law in dependent territories, the application or non-application of common law distinctions outside England, and the assumptions made by judges.[16]

In Penang and Malacca this position remains unchanged, but in Singapore Chinese law now has no effect because of the provisions of the Women's Charter (Ordinance 18 of 1961, amended by Ordinance 9 of 1967).

THE FEDERATED AND UNFEDERATED MALAY STATES

Generally, the law applicable in any Malay State at the time when it became subject to British protection remained in force notwithstanding the treaty. It was subject only to legislative amendment. There was local legislation in the Federated Malay States and in the Unfederated States. The legislation was piecemeal and left many gaps which the judges attempted to fill as well as they could. The outstanding example of this is the Selangor case of *Re Yap Kwan Seng's Will*[17] where the judge had to consider whether the rule against perpetuities applied in that state. In the course of the judgment it was said[18] that the general law of England was never adopted in this state though English principles and models were utilized. The judge recognized the rule against perpetuities on the grounds of public policy and of comity with the laws of the Straits Settlements.[19]

Johore, an Unfederated Malay State, had adopted part of English law on the grounds of comity with the Federated States and the Straits Settlements. In addition the court found that an interpretation of the terms of Johore legislation demanded the use of common law principles.[20]

This brings us to the systems of legislation in the two classes of Malay States. In each of the Federated States there was legislation known variously as Orders in Council and Enactments.[21] The state legislation was published in a revised edition in 1935 and showed the law in force as of 31 December 1934.

In the case of the Unfederated States, each of them was governed by the laws of their respective State Councils. The legislation from these States has been irregular, and only from Johore and Kedah are there revised editions of the laws. Authority on the hierarchy of precedent is sparse but in cases concerning Chinese law and custom the courts seem to have assumed a uniform body of Chinese custom and have given effect to Straits Settlements and Federated Malay States decisions.[22]

In only one of the states of Malaya, Perak, has there been any legislation on Chinese law. This is found in Perak Order in Council No. 23 of 1893 as amended by Order in Council No. 26 of 1895. This purported to lay down the substance of Chinese law in the State of Perak as to marriage, adoption, inheritance, and intestacy. This order has been considered in three cases. In *Yap Tham Thai alias Yap Fook Siong* v. *Low Hup Neo*[23] the court held that the estate of an intestate Chinese dying domiciled in Selangor should

be distributed according to the principles set out in the Perak Order in Council as modified by local custom. In *Teh Suan* v. *Ang Thuan and anor.*[24] the court approved the Order as stating the Chinese law of infancy. In *Tan Sim Neoh* v. *Soh Tien Hock*[25] the court approved the adoption of a son despite provisions of the Order which provided to the contrary.

We can conclude that the legal recognition of Chinese law in these states has been largely an *ad hoc* recognition by the courts with only minor legislative assistance. This is in strong contrast to the position in the Straits Settlements. Chinese law remains a valid system of personal law in these states today and it is almost completely case law.

Sabah, Sarawak and Brunei

The position in these states presents some contrast to that in both the Straits Settlements and in the Malay States. In *Kho Leng Guan* v. *Kho Eng Guan*[26] the courts stated the sources of law in Sarawak as:

(a) Orders or written laws enacted by or with the authority of the Raja.
(b) English law in so far as it is not modified by (a) and in so far as it is applicable to Sarawak.
(c) Certain law and custom of races indigenous to Sarawak including the Chinese. The court also said that whether or not Chinese law is to be admitted is a question which must be determined according to the rules of English law.

These general principles have been defined, expressly in respect of Chinese, in *Chan Bee Neo and ors.* v. *Ee Siok Choo.*[27] The court held that it would apply Chinese custom:

(a) When the custom is expressly regulated by a Sarawak Ordinance; or
(b) When the custom is expressly regulated by rules made under an Ordinance; or
(c) Where the custom is recognized expressly or impliedly in a Sarawak Ordinance.[28]

The actual effect of these two decisions is illustrated in *Li Khoi Chin* v. *Su Ah Poh*[29] where it was held that the validity of a Chinese marriage in Sarawak is dependent upon registration. In a later case, *Chiew Boon Tong* v. *Goh Ah Pei and anor.*,[30] the court in Sarawak held that a marriage is not valid unless registered under the provisions of the Chinese Marriage Ordinance (cap. 74).

This brings us to a situation where there is direct legislative authority in the provisions of Chinese law. This is also the situation

in Brunei.[31] So far as Chinese law is concerned there are, however, two reported cases which show elements of conflict. In *Liu Kui Tze* v. *Lee Shak Lian*[32] the High Court of Sarawak, North Borneo (as it then was), and Brunei took jurisdiction in divorce with respect to Chinese customary marriages on the following grounds:

(a) That the present court is the direct successor to the 'Chinese Court' first set up by Order IX of 1911.
(b) That this jurisdiction has not been disturbed by any later order or enactment.
(c) That the practice of the former Resident's Courts has always been to take jurisdiction in respect of these marriages.

However, in *Lim Siew Yun* v. *Soong Ah Kaw*[33] the court in Brunei held that it had no jurisdiction on Chinese divorce on the ground that there was no legislation conferring such jurisdiction. The present position in these states thus remains somewhat obscure.

The Extent and Scope of Chinese Law

Before commencing with the substance of this section we should note the variable content of Chinese custom. The judicial decisions reported show that the courts, while using the words 'Chinese custom' as a general term, have in fact been adjudicating upon somewhat localized rules as to marriage, divorce, adoption, etc. Indeed, this point emerges clearly if one compares, for example, the various Orders in Council (Perak Orders 23/1893 and 26/1895) and Reports on Chinese custom (Straits Settlements 1926). This, of course, must seem perfectly obvious, but the courts have sometimes been misled into regarding 'expert evidence' or that body of laws known as the *Ta Tsing Lu Li* as stating a body of regulation common to all Chinese.[34] Bearing this caution in mind we may consider the specific fields in which Chinese law and the common law have interacted.

The Money-loan Association, 'Hwei'[35]

A *hwei* is a group of individuals who join together for the purpose of contributing money to a common pool over a fixed period of time. The contributions are made at meetings at which bidding for the contributions paid at that meeting takes place. The person who offers the highest rate of interest is the successful bidder. A simple example will illustrate this. Suppose a hwei is composed of ten persons who meet once a month and whose monthly subscription is $100.00. In the first month the 'head' collects $900.00 and he keeps

this sum as a loan to himself free of interest. In the second month the successful bidder will receive eight subscriptions plus the head's $100.00 repayment and so on down until all have placed a bid.[36]

The question which has confronted the courts in all the territories is, what is the nature of the legal relationships which arise when a member defaults on payment of principal or interest? The courts have been unanimous in holding that a hwei is not a gambling association, neither is it a money-lending association. But they have been far from unanimous in deciding whether or not the members are related in law, and if they are related, then what the nature of this relationship is. A typical example of the confusion which has arisen is found in *Fan Ngoi Lam and ors.* v. *Asia Cafe and anor.*[37] Here the court found that the hwei consisted of a verbal agreement to be bound by the rules of the association, but the rules did not constitute an agreement or set of agreements between the head and each member. Later in the judgment the court said that 'the nature [of the association] is one of mutual trust'. And a little later the judge managed to say that it is 'a mutual contract'. There are two choices here: either it is an association based on some principle of equity or it is a contractual entity at common law. There is support for both choices.

Equity. The only support for this proposition, apart from Fan's case above, is to be found in two Hong Kong decisions. In *Chan Ka Lam and ors.* v. *Cheung Chung Kong and anor.*,[38] the court held that the head is a trustee in respect of monies paid to him by the members. In *Un Yan Sing and ors.* v. *Fong Lun San*[39] the court said that the head was an implied trustee for the members and the court expressly founded its jurisdiction in equity and not in common law.

Common Law. There is greater support for the basis of the hwei being founded in contract but the nature of the contract and the extent of contractual relations is still a matter of dispute. The cases are divided between two alternatives. First, it has been held in seven cases that the contract is between the head and each member separately. From this it follows that the head is liable to each member for payment of subscription and for the repayment of loans. The receipt given by the member who obtains a loan is in the nature of a promissory note and, on proof of default, a member may sue the head for this sum.[40]

The second alternative is that each member contracts with all other members. The contract is to abide by the rules of the association and to observe all the liabilities necessary for its operation.[41] The case of *Loi Teck Uh* v. *Chieng Lee Tieh*[42] provides an interesting link between the two contractual situations. The court held:

(i) That the head contracts with each and every member to pay back each member's contribution and to guarantee repayment by each successful tenderer.

(ii) The members contract with the head to lend money and to take part in the hwei.

(iii) The members contract with each other through the head who is an agent to tender and to make such payments as may be required.

The I.O.U. which is signed is a written acknowledgement of debt, though it is only prima facie proof of this and may be rebutted by other evidence.

The basis of hwei seems, then, to be founded in contract and not in equity since the members contract at least with the head to observe certain rules and conditions.[43]

Polygamous Marriages — Validity and Form[44]

Chinese polygamous marriages are valid in (East and West) Malaysia and in Hong Kong though no longer in Singapore.[45] In West Malaysia and Singapore (prior to 1961 or 1967) recognition of these marriages demanded the satisfaction of three tests: (a) long continued cohabitation; (b) intention to form a permanent union, and (c) repute of marriage. These requirements, however, have not always been demanded and the Federated Malay States and Straits Settlements cases show variations in the courts' approaches to polygamy.

A summary of the relevant cases illustrates this. In *Cheang Thye Phin* v. *Tan Ah Loy*[46] the court held that it would presume a secondary marriage from evidence of cohabitation and repute. It also said that a ceremony was not essential for such a marriage. In *Chu Keow* v. *Chong Meng Sze*[47] the court said that mutual consent was necessary and that ceremony, contract, and repute are evidentiary only. In *Re Khoo Thean Tek's Settlements*[48] the court said the element of 'permanence' is necessary to constitute a valid secondary marriage and that *factum* and intention must be present upon which long habit and repute may be founded.

The courts have also, in some cases, stated that a presumption as to marriage exists in respect of secondary wives. In *Ong Cheng Neo*

v. *Yeap Cheah Neo*[49] the court laid the onus of proof on the person disputing the existence of a marriage. In *Woon Kai Chiang* v. *Yeo Pak Yee*[50] the court held that where a Chinese male cohabits with a woman and subsequently marries (i.e. goes through a form of marriage with) another woman, a presumption in favour of a former marriage arises. This may give rise to a further presumption that the second woman is at least a secondary wife.

In *Nonia Cheah Yew* v. *Othmansaw Merican and anor.*[51] the court held that the material factors in proving a Chinese marriage were that the woman should be given away by her nearest male relative and that there should be some publicity among the friends of the couple. This emphasis upon form does not appear so much in later cases. However, a Chinese marriage ceremony has been held to confer the status of (at least secondary) wife for the purposes of statutory interpretation.[52]

The courts have distinguished between a valid polygamous marriage and bigamy and the principle was early laid down that the distinction must depend upon the relevant provisions of Chinese law.[53]

In Sabah and Sarawak the position on Chinese marriages is slightly different in that these marriages are regulated by statute[54] and their validity is therefore to be judged by the requirements of the Ordinance, the most important of which is registration with a Registrar of Chinese marriages.[55] In the case of an unregistered Chinese marriage only the court can determine whether it is valid.[56]

In Hong Kong the position of the law in respect of secondary marriages seems broadly similar to that in Malaya and Singapore. Thus, in *Ng Ying Ho and anor.* v. *Tam Suen Yu*[57] the evidence required to show that a woman was a *t'sip* (secondary wife) included being received into the husband's family, and formally introduced to them, worshipping at the ancestral tablets, and serving tea to the principal wife.

The courts in each of the three territories mentioned above have had to face their own peculiar problems in respect of Chinese marriages. In Singapore, Malaysia, and Hong Kong, apart from the general question of polygamy, the problem of inter-racial marriages has arisen. There is only one reported case from Hong Kong, *In Re the Estate of Kishan Das.*[58] The court was asked to decide upon the validity of a marriage between a Hindu man and a Chinese woman celebrated according to Hindu rites. It was held that since there was no evidence of the woman having become a Hindu, the marriage was invalid. The court specifically said that the lack of such

evidence rebuts the presumption of marriage. In this decision there seems to have been an undue reliance upon the form of marriage which also tends to determine capacity.

In the Straits Settlements and Malay States cases this has been avoided. In *Carolis de Silva* v. *Tin Kim*[59] the court determined the validity of a marriage between a Sinhala man and a Chinese widow on the grounds of cohabitation and repute. Perfection of form was held not to be essential to validity. Similarly in *In Re Tay Geok Teat decd.*[60] the court determined the validity of a marriage between a Chinese man and a Japanese woman on grounds of cohabitation and repute.

However, the recognition of inter-racial marriage has not been without difficulties: these have revolved around the notion of consensus[61] as being the fundamental element of common law marriages. The outstanding example of this situation is the decision in *Re Abraham Penhas decd.*[62] The case decided the validity of a marriage between a Jewish man and a Chinese woman celebrated in Singapore by Jewish and Chinese rites on the basis that it was a common law marriage. The Privy Council held that as there was consensus to enter into a marriage, the marriage was valid. Consensus was taken as a sole criterion but in respect of marriage between two Chinese the courts have found that the elements of intent, cohabitation, and repute are necessary to establish validity.

There are thus two sets of requirements: where one party only is Chinese then the common law marriage doctrine of consensus applies. An essential element to this is that the marriage is monogamous. On earlier authority, if both parties are Chinese then three requirements are necessary.

However, in *Yeow Kian Kee decd: Er Gek Cheng* v. *Ho Ying Seng*[63] a Chinese secondary marriage was found to exist solely on the basis of consensus. How is this to be reconciled with *Penhas*? If Penhas is accepted then the doctrine of consensus should apply to Chinese secondary marriages. But this is not possible. On the other hand, if Penhas is rejected then it is not possible to have a valid common law marriage except where one of the parties is racially non-Chinese. This is quite unacceptable.

These two decisions should be read in the light of *Yee Yeng Nam* v. *Lee Fah Kooi.*[64] This decision makes clear that in Malaysia it is possible for Chinese to contract marriages which may be either monogamous or polygamous at inception. It seems from the tenor of the decision that the type of marriage actually existing between the parties is a matter of fact to be proved to the Court's

satisfaction. In this case the marriage was held to be monogamous because the parties were married under the Straits Settlements Christian Marriage Ordinance 1940, which, though it does not provide that a marriage under its provisions is monogamous, enables persons married under it to enter into a monogamous marriage.

The courts in the former Borneo territories have not had to face this problem but have had their own particular problem. This has resolved around the custom known as *sim-boo-kian*. This describes the situation where a girl is 'purchased' for a sum of money with the intention of bringing her up as a prospective bride for the son of the family. The purchase price is known as *brian*.[65] A breach of the agreement by taking the girl away, for example, is liable to result in the payment of damages and/or the return of brian. This form of marriage was recognized in *Yek Hing Po* v. *Tou Nih Hiong*[66] but in *Pang Chin* v. *Pang Chon Pee*[67] the court refused to recognize the custom of 'buying and selling children' on the somewhat humorous ground that this was not a valid contract of sale at common law. The court has, however, upheld a marriage where a girl was given to a family so that she might become the wife of a son of the family.[68]

Divorce

This question has provided little difficulty in any of the jurisdictions. There is only one reported case from Hong Kong: the outstanding feature of this law is that it provides for divorce by mutual consent. In *Lee Wah Fui* v. *Lan*[69] the court held that a contract of mutual divorce was sufficient to dissolve a marriage celebrated in Hong Kong according to customary rites.

In Malaya and (prior to 1961) in Singapore the law regarding Chinese customary divorce is well settled. A secondary wife may be divorced if she has shown disobedience to her husband or to the principal wife, or if she has been guilty of immoral conduct. In addition, a husband must notify his relatives and clansmen of the divorce.[70] On the general principle of divorce the courts have held that Chinese may only divorce according to custom so long as they marry under custom. If they marry under the provisions of any Ordinance, then the grounds of divorce must be as determined by the Ordinance.[71] The courts will not allow a woman to divorce her husband unilaterally.[72]

Customary divorce in the former Borneo territories is recognized by the courts on the general principle that the court has jurisdiction

because the present High Court is the direct successor to the 'Chinese Court' (Order IX, 1911), that this jurisdiction has not been disturbed by any later order or enactment and because the practice has always been to grant divorces in respect of Chinese marriages.[73] The jurisdiction has been extended to cover decrees of judicial separation.[74] The courts have insisted that the practice of mutual divorce, which they recognize, has no effect without a declaration by the court.[75]

Unlike the courts in Malaya and the former Straits Settlements, the courts in Sarawak, Sabah, and Brunei have not laid down general principles on grounds for divorce. They have instead preferred to accept evidence on a case by case basis as to the custom of different dialect groups. In one case the court even accepted, on the basis of expert evidence, that there was no custom governing Hakka divorce as the practice was to leave this matter to the courts.[76] This is probably incorrect, the weight of authority being against such a conclusion.

The courts have accepted the following as grounds for divorce:

Foochow: (a) desertion;[77]
(b) failure to maintain;[78]
(c) that the parties are completely out of sympathy and find it impossible to live together.[79] The court refused to recognize lack of intelligence as a ground for divorce[80] but has recently allowed a dissolution for incurable insanity.[81]

Hakka: (a) if both parties agree to a mutual divorce;[82]
(b) failure to maintain;[83]
(c) if the wife has left and there is no possibility of reconciliation.[84] In an earlier case the court refused to recognize this ground.[85]

Henghua: (a) ill treatment by the husband;
(b) failure to maintain for at least a year.[86]

Adoption and the Rights of Adopted Children to Succeed to Property

It is notable that the Hong Kong courts have consistently recognized adoption on the basis of *T'sing* law.[87] The primary reason for adoption has been held to be to prevent the extinction of a family and an adoption for such a purpose is valid.[88] As proof of an adoption the court has accepted as evidence that formalities of adoption have been performed and recorded in family books, at temples and inscribed on tablets.[89] The custom

of adoption will be given effect to so long as it does not conflict directly with any ordinance. The Infants' Custody Ordinance (cap. 13), for example, has been held not to be inconsistent with customary adoptions in Hong Kong.[90] So far as Hong Kong is concerned, it appears to have been assumed that an adopted child stands in all respects as a legitimate natural born child in the matter of succession.

This has not been the case in Malaya and Singapore regarding either testate or intestate property. Most of the reported cases have required the court to make a decision as to whether the term 'children' in a will means adopted children. The weight of authority is to the effect that it does if this can be gathered from the terms of the will itself.[91]

So far as intestate property is concerned, the position is less clear. In *Re Chu Siang Long*[92] the court held that the adopted child of a Chinese was entitled to the joint administration of an estate in preference to a nephew. This decision was expressly based on the provision of the Charters which directed that respect be given to local custom. However, this decision was overruled in *Khoo Tiang Bee et uxor* v. *Tang Beng Gwat*[93] on the grounds that the law as to Chinese adoptions is uncertain, and that it would add one more to the many conflicts of laws in the Straits Settlements where the uniformity of the laws of inheritance must be preserved as far as possible. Some support for the first ground is given in *In the goods of Goh Siew Swee decd.*[94] where the court refused to accept books on Chinese law as evidence.

It is probably settled law now that adopted children will not succeed to an intestate estate in Malaya. This is because the Distribution Ordinance 1958 restricts the status of adoption to persons formally adopted under the Adoption Ordinance of 1952.[95] A similar situation exists in Singapore under the provisions of the Women's Charter.

In Sarawak, Sabah, and Brunei there is no direct authority on adoption, but it is likely that the courts will demand that to be valid it must be regulated or recognized (expressly or implicitly) by some ordinance. Thus in *Wong Teck Giak and anor.* v. *Ting Ni Moi*[96] the court decided the question of custody of a child on these criteria. In *Li Khoi Chin (aliases)* v. *Su Ah Poh*[97] the court said that the law of Sarawak would recognize an adoption made outside Sarawak where the persons concerned were domiciled in the country of adoption.

LEGITIMACY AND LEGITIMATION

This topic is almost entirely confined to Malaya. There are no Hong Kong decisions reported, and the topic is not now relevant in Singapore. There is, however, one case from Sarawak[98] on intestate succession and legitimation by subsequent recognition. The court held that this form of legitimation would be recognized on the basis of Chinese custom.[99] The courts in the Straits Settlements and Federated Malay States have consistently refused to give effect to this form of legitimation.[100]

However, legitimation by subsequent marriage was and (in Malaya) is recognized.[101] The reason for this is that this is an issue which must be decided with regard to the validity of the union between the parents and the obligations arising out of that union as set out by Chinese law and custom.

It is difficult to see why this principle should not be extended to legitimation by recognition. The position on this subject may very well vary as between the states of West Malaysia and East Malaysia and this is unfortunate.

WILLS

The topic of wills falls into two main categories:

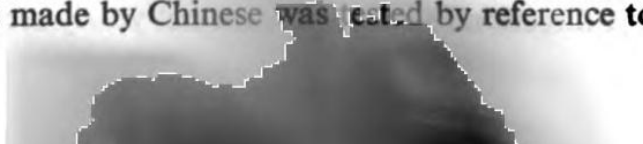
(i) construction, and

(ii) trusts for charitable uses and the rule against perpetuities.

Construction. There is very little material from Hong Kong on the topic of wills generally. The matter was formerly governed by the Chinese Wills Validation Ordinance 1856 and the Wills Act 1861 (U.K.). A committee on Chinese law set up by the Hong Kong government proposed that Chinese, whatever their domicile, might dispose of their property by will and that oral wills should not be permitted.[102] Reference may also be made to *Fu Chuen Sang and anor.* v. *Cheung Ching Tak and ors.*[103] where it was held that a 'wish' for a wife to adopt a son did not create a precatory trust. It should be noted that this case was decided solely on English authorities.

There are only two reported cases from Sarawak[104] in which it was held that the validity and construction of a Chinese will are to be governed by English law. If the will attempts to dispose of property according to Chinese custom then it will be given effect to if the custom is regulated or recognized by a Sarawak ordinance or by rules made under any Sarawak ordinance.

In both the Straits Settlements and the Federated Malay States the validity of wills made by Chinese was [illegible] by reference to English



principles of construction (this is apart from questions of charitable uses). In *Lee Eng Nam* v. *H. T. Jones*[105] it was held that a Chinese widow could make a will because there was nothing either in the common law or in the Perak Order in Council to show lack of testamentary capacity.

In *Re Lee Kim Chye decd.*[106] the court held that when a Chinese marries a secondary wife after making a will such marriage revokes the will.

Trusts for charitable uses — perpetuities: Trusts for charitable uses fall into two classes: a trust for the purchase of land to be used as a burial place for a person or family; and trusts for the performance of ancestor worship.[107] In the only two cases reported from Hong Kong the court held that bequests for 'worshipping expenses' and 'Ancestor's Sarificial Fund' were invalid as offending the rule against perpetuities though they were not superstitious uses.[108]

After some hesitation the courts in Malaya and Singapore have held that a trust for the purchase of burial ground is a valid charitable trust.[109] This is so even though the use of the property was for members of a certain *seh* only.[110] The justification for this appears to be that a seh is a public charity since it is set up to provide burial and worship facilities for its members.[111] Similarly, trusts made for the establishment and upkeep of temples and worshipping places have been considered valid.[112]

Trusts for the purposes of ancestor worship have two aspects. First, the courts have had to consider whether or not they are valid or are superstitious uses. Once again, after some hesitation, they have been held to be valid trusts. In *Re Khoo Cheng Teow decd.*[113] the court held that such a gift is not superstitious but is more in the nature of a gift, for example, to say Masses and may be approved on the same grounds. In an earlier case, *Choa Cheow Neo* v. *Spottiswoode*[114] a gift for the purpose of *sin-chew* was held invalid on the ground that it was not charitable, being of benefit to the testator only. However, in *Lim Chooi Chuan* v. *Lim Chew Chee*[115] a trust providing for the carrying out of sin-chew by the members of one seh was held charitable in that it benefited one part of the public.

The second aspect is the question of perpetuities. A trust for sin-chew is valid only if drawn so as not to infringe this rule.[116] In addition it must be certain. Thus, for example, a sin-chew trust for the benefit of a 'Chinese family' has been held bad for uncertainty.[117] Similarly, a direction to spend income on 'yearly ceremonies accord-

ing to Chinese custom' was held uncertain.[118] Where a trust for sinchew is impressed on real property outside the jurisdiction the court will judge the validity of the direction according to the law of the place where the property is situated. Thus, where the real property was in China and the trust valid at Chinese law, the courts recognized it.[119]

As with all other facets of Chinese custom so far considered any custom must be proved or provable to the satisfaction of the court.[120]

Administration and Succession[121]

Apart from adopted persons the main problem current in this topic has arisen in respect of the rights of secondary wives to administer and succeed, especially with respect to intestate property.

The Hong Kong courts have long settled the law in the colony that in succession to property the operative law is *T'sing* law or local Chinese custom. However, the law as to the mechanics of administration is English law. Thus, for example, the grants of letters of administration is governed by English law but the manner of distribution is governed by T'sing law.[122] The substance of Chinese law must of course be proved to the satisfaction of the court.[123] On administration, the Hong Kong courts have held that a concubine[124] and a widow may administer. The widow may, however, administer only so long as she remains a member of her late husband's family. The fact that she re-marries does not affect this so long as (the court held) she introduces her second husband into the house of her late husband.[125]

On the right of a widow to succeed, the court has held that she has no absolute right but, subject to her right of maintenance, only on behalf of the male succession.[126] If the male line becomes extinct the property will descend to the surviving female relatives of the last deceased male member: this right is not confined to daughters or spinsters.[127]

The courts in East Malaysia have made no pronouncements specifically on administration and succession apart from the general principle that any proved or accepted Chinese custom will prevail over English law.[128] Presumably this is subject to the overriding authority of Sarawak statutes and rules.[129]

The courts in Malaya and Singapore have consistently held that the distribution of a Chinese intestate estate is governed exclusively by the Statute of Distributions. In *Lee Joo Neo* v. *Lee Eng Swee*[130] the court gave two reasons for this. First, that immovable property is governed by the *lex loci rei sitae* and Chinese law cannot be

incorporated within the Statute of Distributions. Second, that movable property is governed by the law of the domicile which does not allow Chinese law to be incorporated in the Statute. This has been recently approved in *Re Chia Eng Say decd.*[131] where the Court said it would not consider any Chinese customs with respect to the Statute.[132]

As far as secondary wives are concerned the result of applying the Statute has been that the courts will order a joint administration of intestate property.[133] In the Straits Settlements, the court has ordered equal shares of intestate property to be given. The reason for this is that since English law provides no rule for determining the proportions, the court cannot order any proportion other than an equal share. Though in China the second wife may have no right to share, this was held immaterial in the Straits Settlements because a first wife would not find it any easier to establish her right to letters of administration than would the second.[134]

The courts have also had to deal with the situation of succession to the estate of a deceased secondary wife. The court presumed intestacy from the rarity of wills among Chinese women of this class[135] and then went on to hold that, in the absence of proof to the contrary, such a woman could not have a successor. Her estate was therefore declared *bona vacantia.*[136] In effect this decision overruled the decision in *Yap Kan Keow and anor.* v. *Low Hup Neo and anor.*[137] which itself arose out of and is part of the decision in *Yap Tham Thai (alias)* v. *Low Hup Neo.*[138] The question remains unsettled except that now the new Distribution Ordinance, No. 1 of 1958, may help to solve the problem.

Summary

This brief account illustrates that Chinese law in Malaysia, as it is constituted at present, is not remarkable either for consistency of development or for clarity of judicial expression. As one commentator puts it, it is a 'baroque muddle'[139] and this is not an unfair description. Recent judicial developments in the law relating to the 'Chinese Christian'[140] tend to bear out this view. A good deal of the confusion clearly arose out of the attempt to adapt English law to principles of Chinese 'custom'. The major problem was to determine what those principles were. These could not be got from texts of Chinese law as such because these were not only incomplete and misunderstood in the nineteenth century but also because they bore no obvious relation to the facts of Chinese life

in the colonies and protected states. No coherent effort was ever made really to establish what were the operative principles governing personal obligation amongst the Chinese communities of Malaysia.

Allied to this deficiency was the practical difficulty of incorporating into the forms and procedures of English law principles which have no necessary relation to that law. This is true to a certain extent of all the personal laws, but the difficulty was compounded, in the case of the Chinese, by an insistence upon the application of technical rules of English law. The wholesale application of the Statute of Distributions is an obvious example. At the same time adjustments were made as in the case of polygamy. The only jurisdictions to adopt some sort of happy medium between excessive rigidity and excessive vacuity were those in East Malaysia. The courts there were (and are) not concerned to follow and lay down binding precedent but to determine each case on its own particular merits within the framework of the free application of personal laws. In some cases, of course, this was taken too far as when the court itself held that 'there is no custom ... the modern practice being to leave it to the courts'.[141] This is open to considerable doubt and draws the function of the court directly into question. This is a neglected question in Malaysia, particularly so far as the personal laws are concerned, but it is important because the personal laws are largely the creation of the judiciary and this is nowhere so well illustrated as in the case of Chinese law.

1. 'Kapitan China'. This institution was known throughout South-east Asia. See Purcell, 1948: 143 ff.

2. cf. Comber, 1961: 56–9.

3. See Buxbaum, 1966: 626–7 for examples; see also a report in the *Straits Times*, 25th May 1966 on a local 'peacemaker'.

4. See Freedman, 1950: 98 who says, with reference to Singapore: '... it is necessary to point out here that, historically, it is probably only since the last quarter of the nineteenth century that government intervention in Chinese affairs has had any great influence. With the disappearance of the Capitans China the internal affairs of the Chinese community largely passed out of the purview of the British administration. Legally and politically the Chinese contrived to maintain their own world. The few civil cases which came up for judgment before the courts had only a limited significance for the Chinese community as a whole. During the half-century before the growth of a system of direct control of Chinese affairs the codes by which Chinese regulated their family affairs and the bodies to which they resorted in cases of dispute were beyond the reach of the government. It was during this period that the secret societies flourished as instruments of political control and courts of law within a closed Chinese society.' On Sarawak see Ward (1968).

5. Purcell, 1948: 143.

6. Summarized in Braddell, 1931: (1) 62–94. See the following judicial decisions: *R.* v. *Willans*, 3 Ky. 16; *Choa Cheow Neo* v. *Spottiswoode*, 1 Ky. 216; *Ong Cheng Neo* v. *Yeap Cheah Neo and ors.* 1 Ky. 326. *In the goods of Khoo Chow Sen*, 2 Ky. Ecc. Rs. 22; *Tan Kiong* v. *Ou Phaik* (1900) 5 S.S.L.R. 77.

7. The earliest example of this basis is a statement by Maxwell C. J. in *Chulas* v. *Kolson* (1877) Leicester's Reports, 462 where the Chief Justice said: 'their own laws or usages must be applied to them on the same principles and with the same limitations as foreign law is applied by our courts to foreigners and foreign transactions'.

8. *Hyde* v. *Hyde*, L.R. 1, P. & D. 130. The judge in this case, however, expressly limited the application of this principle to societies where polygamy is not recognized.

9. The Chinese Civil Code seems to have made some attempt to prohibit polygamy. cf. Book IV, Art., 985, '... a person who has a spouse may not marry again'. The Code did not, however, place any restriction on the formalities required to celebrate a marriage except that there should be some ceremony, that the marriage should be open to the public, and that there be two or more witnesses. Art., 982. cf. Mills, 1949: 28. On the problems which Art., 985 raised for many Chinese cf. McAleavy, 1968: 73–74. In *China Shiu Sui Ping* v. *Chan Din Tsang* [1958] H.K.L.R. 283, the Hong Kong court recognized a Chinese customary marriage which took place in China after May 1931. This marriage was recognized for divorce purposes as being 'a Christian marriage or its civil equivalent', Hong Kong Divorce Ordinance 1952, s. 2.

10. *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] A.C. 346 at 352. *Cheang Thye Pin* v. *Tan Ah Loy* [1920] A.C. 369. *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1921] A.C. 529.

11. See Withers Payne, 1932: 25 ff.

12. *Lim Chooi Hoon* v. *Chok Yoon Guan* (1893) 1 S.S.L.R. 72.

13. *Re Choo Eng Choon* (1911) 12 S.S.L.R. 120 at 224 ff.

14. *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] A.C. 346.

15. See Mills (1949) for a summary. See also Chapter 1 above where the question is considered in more detail.

16. Examples of this can be found in *Carolis de Silva* v. *Tin Kim* (1904) 9 S.S.L.R. 8. *Cheng Ee Mun* v. *Look Chun Heng* [1962] M.L.J. cxxxvi (comment) and 411 (report).

17. (1924) 4 F.M.S.L.R. 313.

18. (1924) 4 F.M.S.L.R. 316–18.

19. The Courts have also applied rules of equity in the Federated Malay States. *Motor Emporium* v. *Arumugan* [1933] M.L.J. 276 at 278 (Selangor).

20. *Goh Eng Seong* v. *Tay Keng Seow* [1935] M.L.J. 50.

21. Negri Sembilan from 1883, Pahang from 1889, Perak and Selangor from 1877.

22. See the cases cited in the recent decision on Chinese custom. *In Re Ding Do Ca decd.* [1966] M.L.J. 6. It was held, however, that the courts of the Federated Malay States had no jurisdiction to deal with issues affecting conjugal rights among the Chinese. *Choi Wai Ying* v. *Cheong Weng Chan and ors.* [1933] M.L.J. 301. See also *Lim Chye Peow* v. *Wee Boon Tek* (1871) 1 Ky. 236, but see *contra R.* v. *Loon:* re *Khu Lak Neoh* (1864) W.O.C. 39.

23. (1922) 1 F.M.S.L.R. 383; (1925) 6 F.M.S.L.R. 13.

24. (1922) 2 F.M.S.L.R. 43.

25. (1922) 1 F.M.S.L.R. 336.

26. [1928–41] S.C.R. 60.

27. [1947] S.C.R. 1.

28. This was followed and applied in *Wong Teck Giak and anor.* v. *Ting Ni Moi* [1950] S.C.R. 1, and 39 (appeal).

29. [1950] S.C.R. 17.
30. [1956] S.C.R. 58.
31. This state is not part of Malaysia but has a special relationship to it.
32. [1953] S.C.R. 85.
33. [1960–63] S.C.R. 105.
34. See for example: *Nonia Cheah Yew* v. *Othmansaw Merican and anor.* (1861) 1 Ky. 160; *R*, v. *Sim Boon Lip* (1902–3) 7 S.S.L.R. 4; *Wong Pun Ying* v. *Wong Tin Hong* [1963] H.K.L.R. 37. The Straits Settlements Chinese Marriage Committee (Singapore Government Printer, 1926), however, took evidence from the Straits and Chinese born Hokkien, Cantonese, Teochew, Hakka and Hailam communities. This question has arisen again in *Mary Ng* v. *Ooi Kim Teong* [1972] 2 M.L.J. 18. See also Wee (1973) on this case. In the Sarawak case, *Lam Yet Hong* v. *Tan Hui Kheng* [1973] 1 M.L.J. 90, the court referred to a book published by the Sarawak Government in 1955 entitled 'Chinese Family Law' which contains the 'laws of China'. These are apparently the customs and practices of South China and were accepted by the court in Sarawak as applicable in the present suit.
35. The spelling of this term (and *sim-boo-kian* below) is that used in the law reports and is retained here for ease of recognition. On this question see Buxbaum, 1966: 630n. 30. See also *Low Cheng Soon & ors.* v. *Low Chin Piow* [1933] S.S.L.R. 548 for a variety of romanizations.
36. See below Chapter 6 on the Indian *kuthu*. See also Gamba, 1958: 39–41.
37. (1929–30) 24 H.K.L.R. 1.
38. (1915) 10 H.K.L.R. 157.
39. (1913) 8 H.K.L.R. 89.
40. *Chow Cham* v. *Yuet Seem* (1910) 5 H.K.L.R. 233; *Soo Hood Beng* v. *Khoo Chye Neo* (1896) 4 S.S.L.R. 115 (manager is agent for members); *Lau Chuo Kiew* v. *Hii Chee Soon* [1966] M.L.J. 126; *Lee Pee Eng* v. *Ho Sin Leow* [1958] S.C.R. 18 (an agreement to repay money tendered for and received is an enforceable agreement); *Luk Dai Chung* v. *Ngu Ee Nguok* [1966] M.L.J. 119 (head may be liable to the members for the debt of a member); *Ngu Ee Nguok* v. *Lee Ai Choon* [1965] M.L.J. 32 (default by a member must be proved and the onus of proof is upon the person asserting); *Tan Siew Hee & ors.* v. *Hii Sii Ung* [1964] M.L.J. 385 (the receipt given by a successful tenderer, which is in the nature of a promissory note, raises the presumption of [oral] contract for which there must be consideration and evidence is admissible to show want of consideration).
41. *Chan Iu Sang* v. *Tam Wai Sang* (1927) 22 H.K.L.R. 129.
42. [1960–63] S.C.R. 325.
43. See also the statement of Lord Herschell in *Clarke* v. *Dunraven* [1897] A.C. 59 at 63 ... 'undertaking to be bound by ... rules to the knowledge of each, is sufficient, I think, where these rules indicate a liability on the part of one to the other, to create a contractual obligation to discharge that liability. That being so, the parties must be taken to have contracted that a breach of any of these rules would render the party guilty of that breach liable....'
44. Such marriages cannot be contracted in Singapore possibly since 1961 but certainly from 1967—Women's Charter (Ordinance 18 of 1961 as amended by 9 of 1967). However, the problem of polygamy linked with considerations of domicile may still give rise to problems in Singapore Courts.
45. See Buxbaum, 1966: 639n. 78 that secondary relationships do probably continue in Singapore despite the Women's Charter.
46. (1921) 14 S.S.L.R. 79.
47. [1961] M.L.J. 10.
48. [1928] S.S.L.R. 178 [1929] S.S.L.R. 50 (appeal). See also: *Lee Choon Guan decd; Lew Ah Lui* v. *Choa Eng Wan* [1935] M.L.J. 78; *Lee Seang Neo and ors.* v. *Low Hin Tuan and ors.* (1925) 5 F.M.S.L.R. 154; *In the Estate of Lee*

Siew Kow decd. [1952] M.L.J. 184; *Ngai Lau Shia* v. *Low Chee Neo* (1921) 14 S.S.L.R. 35; *Seow Beng Hay* v. *Seow Soon Quee* [1933] M.L.J. 111 (a man may marry a *t'sip* — secondary wife — before a *t'sai* — first wife). *Soh Eddie* v. *Tjhin Feong Fah* [1951] M.L.J. 124; *Tan As Bee* v. *Foo Koon Thye and anor.* [1947] M.L.J. 169; *Re Yeo Seng Whatt decd.* [1949] M.L.J. 60 and 241; *Re Yeow Kian Kee decd. Er Gek Cheng* v. *Ho Ying Seng* [1949] M.L.J. 171.

49. (1877) Leicester's Reports 314.

50. [1926] S.S.L.R. 27.

51. (1877) Leicester's Reports 167.

52. *Soong Voon Sen* v. *Ang Klong Hee* [1933] M.L.J. 262.

53. *R.* v. *Yeah Boon Leng* (1890) 4 Ky. 630; see also *R.* v. *Sim Boon Lip* (1864) W.O.C. 39 and *R.* v. *Teo Kim Choon* [1947] S.L.R. 58.

54. The Chinese Marriage Ordinance, 1933 (cap. 74 revised laws 1946 — see especially section 4).

55. *Chiew Boon Tong* v. *Goh Ah Pei and anor.* [1956] S.C.R. 58.

56. *Chiew Boon Tong* v. *Goh Ah Pei and anor.* [1956] S.C.R. 58.

57. [1963] H.K.L.R. 923; see also *Au Hung Fat* v. *Lam Lai Ha* [1959] H.K.L.R. 527.

58. (1932–33) 26 H.K.L.R. 42.

59. (1904) 9 S.S.L.R. 8.

60. [1934] M.L.J. 83.

61. On consensus generally see *R.* v. *Millis* (1844) 10 Cl. & F. 534.

62. [1950] M.L.J. 104; [1953] A.C. 304, cf. Maurice Freedman (1953).

63. [1949] M.L.J. 171.

64. [1956] M.L.J. 257.

65. This term is not Chinese: it is Malay and is used to mean bride price; see 4 *Sarawak Museum Journal* (1935) No. 15, Part IV, 395.

66. [1953] S.C.R. 59; see also *Chia Ah Kiaw* v. *Tan Ka Yong* [1928–41] S.C.R. 115.

67. [1952] S.C.R. 18.

68. *Loh Chai Ing* v. *Lau Ing Ai* [1959] S.C.R. 13. This was a Foochow marriage and is known as a *T'ung Yang-Hsi* marriage. cf. *sim-boo-kan* above.

69. [1964] 2 All. E.R. 248; see Buxbaum 1966: 641n. 86.

70. *Re Lee Gee Chong decd.* [1965] M.L.J. 102. *In the estate of Sim Siew Guan decd.* [1932] M.L.J. 95; see also *Woon Ngee Yew & ors.* v. *Ng Yoon Thai & ors.* [1941] M.L.J. 32.

71. *Re Soo Hai San and Wong Sue Foong* [1961] M.L.J. 221.

72. *Cheng Ee Mun* v. *Look Chun Heng & anor.* [1962] M.L.J. 411.

73. *Liu Kui Tze* v. *Lee Shak Lian* [1953] S.C.R. 85.

74. *Chien Mau Ong* v. *Wong Suok* [1956] S.C.R. 97: compare *Lim Siew Yun* v. *Soong Ah Kaw* [1960–63] S.C.R. 105.

75. *Wong Chu Ming* v. *Kho Lieng Hiong* [1952] S.C.R. 1.

76. *Yong Mong Yung* v. *Chai Shong* [1964] M.L.J. 424.

77. *Lee Yung Kiang* v. *Ling Yun Tie* [1965] M.L.J. 87. See also *Tang Sui Ing* v. *Goh Tien Liong* [1964] M.L.J. 406.

78. *Loh Chai Ing* v. *Lau Ing Ai* [1959] S.C.R. 13. See also *Tang Sui Ing* v. *Goh Tien Liong* [1964] M.L.J. 406.

79. *Tang Sui Ing* v. *Goh Tien Liong* [1964] M.L.J. 406.

80. *Loh Chai Ing* v. *Lau Ing Ai* [1959] S.C.R. 13.

81. *Kong New Siew* v. *Lim Siew Hong* [1971] 1 M.L.J. 262. The test for incurable insanity was taken to be that set out in the English case, *Whysall* v. *Whysall* [1960] P. 52.

82. *Kong Nyat Moi* v. *Leong Sing Chiang* [1965] M.L.J. 73.

83. *Lo Siew Ying* v. *Chong Fay* [1959] S.C.R.1.

84. *Lo Siew Ying* v. *Chong Fay* [1959] S.C.R. 1.

85. *Thia Whee Kiang* v. *Kueh Eng Seng* [1955] S.C.R. 75.

86. *Siaw Moi Jea* v. *Lu Ing Hui* [1959] S.C.R. 16.

87. *Chinese Law and Custom in Hong Kong* — report pp. 49–53. The committee cited an extract from a report made in 1883 which contained 'forms' for the transfer of a son and deed of sale of a son into adoption and a letter of instructions referring to an adopted son, see pp. 194–9. See also *In the goods of Chan Tse Shi* (1954) 38 H.K.L.R. 9; *Wong Yu Shi and ors.* v. *Wong Yin Kuen* [1957] H.K.L.R. 420; *Chan Yue (alias)* v. *Henry G. Leong Estates Ltd.* (1953) 37 H.K.L.R. 66.

88. *In the estate of Ngai I: Ngai Chung Shi and anor.* v. *Ngai Yee Mui* (1927) 22 H.K.L.R. 105.

89. *Cheang Thye Gan* v. *Lim Ah Chen and ors.* (1921) 16 H.K.L.R. 19.

90. *Lui Yuk Ping* v. *Chow To* [1962] H.K.L.R. 515.

91. Cases to the effect that 'children' means adopted children: *In Re Kho Khye Chear decd.* [1938] M.L.J. 224; *In Re Lim Yew Teok decd.* [1937] S.S.L.R. 243; *Quaik Kee Hock* v. *Wee Geok Neo* [1886] 4 Ky. 128; *Re Tan Hong decd.* [1962] M.L.J. 355; *Re Teo Soo Piah decd.* [1950] M.L.J. 176; *Re Yeo Soo Theam decd.* [1937] S.S.L.R. 276; *Cheok Chin Huat* v. *Cheok Chin Soon* [1937] S.S.L.R. 103; *Re Tan Cheng Siong decd.* [1937] S.S.L.R. 293; *Tan Phee Teck* v. *Tan Tiang Hee* [1952] M.L.J. 240.

92. (1877) Leicester's Reports 460.

93. (1877) 1 Ky. 413. This case was cited with approval by the Privy Council in *Re Choo Eng Choon decd.* [1930] A.C. 346 at 355.

94. (1911) 12 S.S.L.R. 18.

95. See *Re Loh Toh Met: Kong Lai Fong* v. *Loh Heng Peng* [1961] M.L.J. 234. Similarly, the adoption of a person into the family of a man already deceased at the time of adoption is no longer valid — see *Tan Sim Neoh* v. *Soh Tien Hock* (1922) 1 F.M.S.L.R. 336.

96. [1950] S.C.R. 1 and 39 (appeal).

97. [1950] S.C.R. 17. See also *Jong Chan Siong* v. *Loh Shui Kin* [1973] 1 M.L.J. 245, *Lam Yet Hong* v. *Tan Hui Kheng* [1973] 1 M.L.J. 90.

98. *In the estate of Chan Chin Hee decd.* [1948] S.C.R. 6.

99. The court approved the following grounds: (a) If the parents of the father wish to recognize the child. (b) If other elders of the family wish to recognize the child provided the father consents. (c) A person's name carved on a tombstone is evidence, not necessarily conclusive, of his legitimation.

100. *Khoo Hooi Leong* v. *Khoo Choong Yok* [1930] S.S.L.R. 127. *In Re Khoo Tek's Settlements* [1929] S.S.L.R. 50.

101. *In the estate of Choo Eng Choon decd.* (1911) 12 S.S.L.R. 120 at 224.

102. *Chinese Law and Custom in Hong Kong* — report pp. 63–64.

103. [1961] H.K.L.R. 219.

104. *Chan Bee Neo and ors.* v. *Ee Siok Choo* [1947] S.C.R. 1. *Re Tay Lim Tiang decd.* [1955] S.C.R. 17.

105. (1923) 3 F.M.S.L.R. 42.

106. [1936] M.L.J. 49.

107. Variously referred to in the reports as *sin chew, chin shong*. See generally Then (1969–70).

108. *In Re Chan Quan Ee* (1920) 15 H.K.L.R. 74; *Lan Leung Shi* v. *Lau Po Tsun* (1911) 6 H.K.L.R. 149.

109. *Lee Poh Lian Neo and ors.* v. *The Chinese Bankers Trust Co. Ltd* [1941–42] S.S.L.R. 28.

110. *Cheang Tew Muey and ors.* v. *Cheang Cheow Lean Neo & ors.* [1930] S.S.L.R. 58. See also *Ang Siew Hock* v. *Ang Choon Koay* [1970] 2 M.L.J. 149.

111. *Yeoh Him & ors.* v. *Yeoh Cheng Kong & ors.* (1889) 4 Ky. 500: see *contra Re Yap Kwan Seng decd.* (1924) 4 F.M.S.L.R. 313.

112. *Tan Chin Ngoh* v. *Tan Chin Teat & ors.* [1946] S.L.R. 14; *Re Low Kim Pong's Settlement Trusts* [1938] S.S.L.R. 144.

113. [1932] S.S.L.R. 226; see also *Ong Geok Neo* v. *Chee Hoon Bong & ors.* (1893) 1 S.S.L.R. 53; *Phan Kin Thin* v. *Phan Kuow Yung* [1940] M.L.J. 35.

114. (1869) 1 Ky. 216.

115. [1948–49] M.L.J. Supp. 66.

116. *Re Tan Kim Seng decd.* (1911) 12 S.S.L.R. 1. *Re the trusts of Wan Eng Kiat* [1931] S.S.L.R. 57.

117. *Re the trusts of Wan Eng Kiat* [1931] S.S.L.R. 57.

118. *Re Chen Ah Sang decd.* [1949] M.L.J. 14.

119. *Ng Eng Kiat* v. *Goh Lai Mui & ors.* [1940] S.S.L.R. 78.

120. *Choy Mien Hew* v. *Choy Weng Tung & anor.* [1932] S.S.L.R. 126. See also *Li Chik Hung* v. *Li Pui Choi* (1911) 6 H.K.L.R. 12 where the law as to 'ancestral property' had to be proved on the ground that there is no such form or property in English law. See also *Lam Yet Hong* v. *Tan Hui Kheng* [1973] 1 M.L.J. 90.

121. Not including the rights of adopted persons — see above 'adoption'.

122. *Wong Pun Ying* v. *Wong Ting Hong* [1963] H.K.L.R. 37; see also *Chan Yeung* v. *Chan Shew Shi* (1925) 20 H.K.L.R. 35; *Ho Cheng Shi* v. *Ho Sau Lam* (1920) 15 H.K.L.R. 35; *Chan Shun Cho* v. *Chak Hok Ping* (1925) 20 H.K.L.R. 1; *Ho Tsz Tsun* v. *Ho Au Shi & ors.* (1915) 10 H.K.L.R. 69.

123. *Li Chik Hung* v. *Li Pui Choi* (1911) 6 H.K.L.R. 12.

124. *Ho Sau Lam* v. *Ho Cheng Shi* (1916) 11 H.K.L.R. 92.

125. *In Re the Estate of Ngai I.* (1927) 22 H.K.L.R. 105.

126. *Tang Choy Hong* v. *Tang Shing Mo & ors.* (1949) 33 H.K.L.R. 58.

127. *In Re the estate of Ngai I.* (1927) 22 H.K.L.R. 105.

128. *Re Tay Lim Tiang decd.* [1955] S.C.R. 17.

129. *Kho Leng Guan* v. *Kho Eng Guan* [1928–41] S.C.R. 60.

130. (1887) 4 Ky. 325.

131. [1951] M.L.J. 130.

132. Attention is here drawn to the case of *Yap Tham Thai (alias)* v. *Low Hup Neo* (1922) 1 F.M.S.L.R. 383; (1925) 6 F.M.S.L.R. 13. Here it was held that succession to the estate of an intestate Chinese domiciled in Selangor should be distributed according to the broad principles of Chinese family law as set out in the Perak Order in Council (No. 23 of 1893) as modified by certain rules of local custom. In coming to this conclusion the court based itself upon the following grounds: (a) There is no Chinese personal law similar to that of Muslims or Hindus; (b) There is a common law of Selangor applicable in this case; (c) The intestate must be regarded as of 'British nationality'.

This case was, however, a decision from the Federated Malay States into which English law was never introduced in its entirety. The judge, therefore seems to have assumed that the Statute did not apply in the Federated Malay States and that he was subject to local legislation *viz.* the Perak Order in Council. Distribution of an intestate estate is now governed by Ordinance No. 1/1958 replacing cap. 71/1930 revised laws of the Federated Malay States, 1935.

133. *In the Goods of Ing Ah Mit* (1888) 4 Ky. 380.

134. *In the Goods of Lao Leong An* (1893) 1 S.S.L.R. 1.

135. *Lee Seang Neo and ors.* v. *Low Hin Tuan* (1925) 5 F.M.S.L.R. 154.

136. *Official Administrator F.M.S. for Chua Swee Sim Neo decd.* v. *State of Selangor* [1939] M.L.J. 175.

137. (1925) 6 F.M.S.L.R. 13.

138. See note 132 above.

139. Freedman, 1968: 55.

140. cf. Chapter 1.

141. *Yong Mong Yung* v. *Chai Shang* [1964] M.L.J. 424.

6
HINDU LAW

Introduction

HINDU law presents a marked contrast to Chinese law in its Malaysian development. At first sight this might seem rather odd because from the point of view of the dominant English law both Chinese and Hindu laws were 'customary' and so prima facie susceptible to similar treatment by the courts. There are at least two reasons why this did not occur. First, and probably most important, Hindu law, unlike Chinese law in Malaysia, has been formulated by the courts upon the basis of authoritative texts. The courts had available the great Indian treatises of the nineteenth century, such as those of Mayne, Jolly and Mulla, to which they referred without hesistation. In addition, precedent from the Indian jurisdiction was freely cited and relied upon. One could almost say, in some matters at least,[1] that the development of Hindu law in Malaysia was but a continuation and adaptation of Hindu law in India. This was never the case with Chinese law; indeed the major problem in the nineteenth century was to ascertain what the substantive principles of this law should be. There were no texts to fall back on because it was realized that the laws of Imperial China were not of such a nature as to be able to effectively regulate the affairs of the Chinese immigrant in Malaysia.[2] Neither was there any precedent of the type available from India. In the event, therefore, Chinese law is a much more original creation in Malaysia than is Hindu law although this is not to deny the existence of some local characteristics in the development of the latter.

Second, the activities of the Indian and Chinese immigrant communities provide a point of contrast; an important section of the Indian community engaged in commercial activity, particularly money-lending, but attempted to regulate this in accordance with their own laws rather than in terms of English commercial law. Further, these regulations were tied firmly to major institutions of Hindu law, most notably the joint family. So far as the courts were

concerned Indian mercantile custom presented an important issue of public policy, whether or not to admit a form of financial transaction outside and independent of the received English law. This was an issue which never arose in the case of the Chinese who conducted their commercial affairs within the framework of English law.[3] The result so far as the Indian community is concerned has been an increasing subjection of Hindu law, or rules claimed to be such, to English law or to Indian precedent. Bearing these comments in mind we now go on to look more closely at the substance of Hindu law in Malaysia.

Institutions of Hindu Law

The courts have never seriously questioned the application of Hindu law (also known as Hindu law and custom) in either Singapore or Malaysia. In the earliest reported case, *Pootoo* v. *Valee Uta Taven & anor.*,[4] decided in 1883, the courts assumed the relevance of Hindu law without argument. This was a case involving the right of a Hindu wife to hold realty and personalty as separate property during coverture. Evidence was given on the principles of Hindu law and it was solely upon the basis of this evidence that the decision rested. In a later case, *Karpen Tandil* v. *Karpen*,[5] decided in 1895, the question of recognition of Hindu law was explicitly raised. The point at issue was the validity of a marriage brokage contract which, though valid at Hindu law, was invalid at common law as being contrary to public policy. The court decided that Hindu law must be recognized on the grounds of equity and natural justice; the judgment in support cited the words of Sir Peter Benson Maxwell in *Choa Choon Neoh* v. *Spottiswoode*.[6] In both *Pootoo's* case and *Karpen's* case evidence of Hindu law was given on the basis of authoritative Indian decisions so that questions as to the validity of any custom did not arise at this stage.

Local custom, however, has also been pleaded although there is only one case directly on this point. In this suit, *Nagammal* v. *Suppiah*,[7] the issue was the validity of a 'Straits Settlements Tamil custom' which specified the return of property contributed to a marriage when the marriage had effectively come to an end.[8] In deciding the issue the court based itself solely upon the provisions of local Tamil custom. After hearing expert evidence on the content of this custom[9] the court determined its validity on the following tests: (a) that it should be clearly proved and definite and (b) that it should be reasonable. There was no difficulty on the first point

but as to reasonableness the court proceeded to ask itself two questions. First, 'is this custom inconsistent with modern views and trends of thought amongst the Tamil community of this Settlement?' This was answered in the negative. The second question was, 'was it contrary to natural justice?' With the answer again being in the negative the custom was held to be reasonable and on this basis was recognized.[10]

The cases discussed above may be read to show three grounds for the recognition of Hindu custom. These are Charter interpretation (*Karpen Tandil* v. *Karpen*), natural justice, and reasonableness of custom (*Nagammal* v. *Suppiah*). There is, however, one further ground: this is the application of principles of private international law which is illustrated in *Soundara Achi* v. *Kalyani Achi.*[11] The issue here was the validity of a simultaneous adoption by the two widows of an intestate domiciled in India. The adoptions were made with the consent of the intestate's father (the nearest *sapinda*). Although this was invalid under the Mitakshara school of Hindu law it was found to be a definite and proved custom of the Nattukottai Chettiars of south India. Since the deceased was domiciled in India at the time of his death and was a member of this group the adoptions were held valid as the *lex domicilii* allowed for such adoptions. In addition the court held that the widow's rights to succession were governed by the Hindu Women's Rights to Property Act. Reference may also be directed to *Inderjit Kaur* v. *The State Advocate General,*[12] where it was held that Sikhs, if domiciled in India, are governed by the Hindu Marriage Act, 1955, as to the validity of marriage.

Bearing these general principles in mind we may now turn to particular instances of Hindu custom which have from time to time exercised the courts.

Marriage Brokage Contracts

Apart from the decision in *Karpen Tandil* v. *Karpen*[13] there is only one other case on this point, *Khem Singh* v. *Anokh Singh.*[14] In this case it was decided that such contracts are invalid as being against public policy. This is directly opposed to *Karpen's* case but may be distinguished because *Khem Singh* was decided on statutory provisions, viz. sections 23 and 65 of the Contracts Enactment, 1899. These sections relate to public policy and presumably marriage brokerage contracts were felt to be conducive to immorality, although there is no clear indication of why this should be so from the judgment. This judgment was later overruled.[15]

The present position on these contracts is that they are probably valid in Malaysia. It is unlikely that they are effective in Singapore.[16]

MARRIAGE CUSTOMS

This has two aspects: first, the ascertainment of custom and second, what may be called the 'principle of variability of custom'. These two aspects are interconnected. The principle of variability finds its earliest expression in *R.* v. *Ratnam*,[17] a decision on bigamy. It was necessary to prove the validity of a first marriage and the principle[18] was judicially established that this depended upon clear and definite proof that the ceremonies of marriage which took place were suited to the locality, caste and family of the parties involved. On this principle the court then heard evidence from the parties, their parents, witnesses and the 'priest' that the ceremonies fulfilled these requirements. This procedure has been subsequently followed.[19] It was extended to include Selangor Sikh local custom where the parties involved were domiciled in Selangor.[20] These two aspects have led the court to state that Ceylon Tamil Hindus never, as a question of fact, contract polygamous marriages.[21] In *Rajeswary and ors.* v. *Balakrishnan and ors.*,[22] the courts considered this question exhaustively in respect of both custom and statute. Here the issue was whether or not a minor could sue on a contract of marriage founded in custom. The court found that the actual betrothal ceremony at which gifts were exchanged (*Nichayartham*) was merely a confirmation of promises mutually given and which were already effective according to the custom of caste and locality. The gifts which passed at the ceremony were not conditional upon the marriage as it was not proved that this was an essential part of the ceremony. The court found, secondly, that a minor could sue for damages on breach of contract because, following Indian authority,[23] marriage contracts may be distinguished from other contracts.[24]

There is yet a further aspect to Hindu marriage, not directly involving the courts, but just as important. Marriage among Hindus was generally difficult to prove, particularly in the early years of this century where, due to a restrictive immigration policy, the sex ratio (especially on the plantations) was quite disproportionate. The Magistrate's Courts in areas of high Indian population were continually faced with crimes committed for reasons of sex, such as enticement and prostitution. In the conditions prevailing on the plantations, proof of marriage (as this related to crimes) was difficult to find, and nor were the Magistrates' Courts the best place for dealing with such questions. Many marriages were not in fact

accepted as such by the courts[25] and the Hindu Marriage Registration Act of 1924 was an attempt to remedy this situation. However, the act provided only for voluntary registration before District Officers and Honorary Registrars[26] and it was estimated that only seventy-four plantation labourers' marriages had been registered between 1924 and 1928 out of a total of about 1,500 marriages.[27] The act was clearly a failure; registration is still not compulsory, although it is shortly about to become the major feature of a valid marriage, and there is little doubt that a religious ceremony is the sole form at present amongst the majority of the rural Indians in Malaysia. This is no longer as acute a problem as in the pre-war years because the sex ratio is now about normal and, in addition, there have been substantial improvements in rural conditions of life for the Indian though a good deal yet remains to be done.

The 'Conversion' Cases

This category is concerned with the situation where a Hindu already married according to Hindu rites becomes converted to Christianity (almost invariably Roman Catholicism) and contracts a second church marriage during the subsistence of the first. It is of course clear that an unmarried Hindu can make a valid promise, upon which he can be later sued, to marry a Christian. His status as a Hindu does not prevent him from entering into such a contract.[28]

But returning to the conversion situation, there are two authorities for the proposition that such a marriage is a nullity. In *Lopez* v. *Sockalingam Kali*,[29] a Hindu man already married by Hindu rites was converted to Roman Catholicism and went through a form of marriage according to Roman Catholic rites with the petitioner. Both parties were apparently domiciled in Sarawak at the time the marriage was celebrated. It was held invalid since the appropriate ordinance, the Church and Civil Marriage Ordinance (c. 92 revised laws, 1958), section 2, defined marriage as a monogamous institution.[30]

In the second case on this point, *R.* v. *Devendra*,[31] the court, while holding that a change of one's religion did not necessarily change one's personal law,[32] exhaustively reviewed the whole question of conversion. The court drew attention to two Indian decisions on the point. In *Emperor* v. *Lazar*,[33] a Christian who already had a Christian wife married a Hindu according to Hindu rites during the subsistence of the first marriage. The man was charged with and convicted of bigamy. On the other hand, in *Emperor* v. *Antony*,[34] a Hindu convert to Christianity married a Christian according to

Roman Catholic rites. During the subsistence of the marriage he reverted to the Hindu faith and went through a form of marriage according to Hindu rites. A prosecution for bigamy failed. Such a situation cannot arise in Singapore though it may well in Malaysia provided that the Christian marriage is celebrated under the provisions of the Christian Marriage Ordinance, 1956[35] and that the parties can prove a marriage according to Hindu custom.

Conjugal Rights

There are only two cases at this point, both decided a hundred years ago. In *Veeramah* v. *Sawmy*,[36] decided in 1867, the court held that it had no jurisdiction on its ecclesiastical side to entertain suits for the restitution of conjugal rights. No clear reason was given for this decision but it appears to rest upon grounds similar to those described in *Lim Chye Peow* v. *Wee Boon Tek*,[37] *viz.*, that under the Charter of Justice (1855) the civil and ecclesiastical jurisdiction of the court is confined to Christian marriages[38] and that therefore the jurisdiction of the court is only that as exercised 'in the Diocese of London in Great Britain'. So far as Hindus are concerned this would appear to be borne out in *Vadamalia Pillay* v. *Shettay Amah*[39] decided in 1869. Here the court was held to have no civil jurisdiction because (presumably) section 23 of the Courts Ordinance (V of 1868) only gives the jurisdiction which the old Court of Judicature had under the Charter of 1855. No reference to Hindu law was made in the judgment though the editor adds a note referring to *1 & 2 Strange's Hindu law*. The judge decided the issue on *Hyde* v. *Hyde & Woodmansee*[40] where marriage was defined as '...[in Christendom] the union for life of one man and one woman to the exclusion of all others'.

Infants

There is only one reported case on guardianship and this is to the effect that Hindu law and custom on the matter will be subject to the demands of English law. In this case, *Ponniah Pillay* v. *Senthamarai d/o Vellasamy*,[41] the issue was the guardianship of an illegitimate Hindu infant. The court held that section 6 (i) of the Civil Law Enactment directs that all questions of custody are to be decided according to English law subject to any modifications which may be necessary on religious or customary grounds. However, the religion and customs of the parties to the suit could not be allowed to oust the operation of English law. In the event the guiding principle was held to be the welfare of the infant.

On the question of adoption this has only arisen in the context of a direction in a testator's will to his widow(s) to adopt. The purpose of this direction is to keep a joint family (cf. below) in existence and the family remains in existence whilst it is possible to produce a male heir either by natural increase or by operation of law. In *Re Ramasamy Chettiar decd.*[42] it was held that a Hindu widow cannot be compelled to adopt and that no suit will lie to enforce her to do so. The reason for this is that adoption is not a compulsory religious obligation. Adoption is a power which a widow exercises in her own right but it is one which she cannot be compelled to exercise. In making these statements the court relied upon Indian authority on the point.[43]

The courts have, however, allowed simultaneous adoption by two widows[44] though this is invalid under the strict Hindu law. This was justified because, according to the practice of the courts in India, usage will override the written text and in this case this usage was found as a fact to exist among the Nattukottai Chettiars of South India.

Endowments

Endowments are gifts made to religious and charitable institutions including temples, schools and for the relief of poverty.

The matter of endowments has for long (since 1905 – by Ordinance No. 17 of that year) been regulated by statute in the Straits Settlements, and at present in Singapore,[45] Malacca and Penang,[46] the matter is governed by the Muslim and Hindu Endowments Ordinance.[47]

The ordinance provides for the administration of Muslim and Hindu endowments. This includes the appointment of a board for the management of endowments, for the powers of trustees in respect of endowments and makes provision for accounts to be kept and audited and for the filing of a new scheme (for High Court approval) if such should be found necessary.

In brief, the ordinance does not touch the substance of Hindu law and, indeed, in section 2, the interpretation section gives full scope to it. This section is worth quoting in full and runs as follows:

> 'endowment' means any endowment in land or money given or to be given for the support of any Muslim Mosque a Hindu Temple a Muslim or Hindu Shrine or School or other Muslim or Hindu pious, religious, charitable or beneficial purpose.

This ordinance, though not section 2, has been twice interpreted. In *Re Shrine of Habib Nor decd.*[48] the court was petitioned to approve a scheme for the management of a shrine endowment. The court decided that since the primary purpose of the fund was for the upkeep of a shrine then the monies must be expended to this end, including the setting aside of a reserve fund in case of destruction. Any surplus remaining after this should be expended in outright gifts to the needy who were members of the class of persons (Muslims in the area) to whom the donors belonged.

In *Re Valibhoy decd.*[49] the court was asked to decide whether or not it had power to compel the performance of a trust set up in respect of a Hindu endowment. The court held that it had power to compel the performance of a trust where the trustees are within the jurisdiction. Where the trust is imposed and coupled with a power (in this case the power of the Board under section 13) the court will compel the trustee to carry out the trust in a proper manner and within a reasonable time. It is to be noted that the two decisions alluded to above do not touch questions of substantive religious law.

This ordinance has recently been replaced in Singapore by the new Hindu Endowments Act.[50] The general effect of the act is to constitute the Board of Management of any endowment a corporation in which the property of the endowment is vested. The act makes provision for the transfer of property already vested in the Muslim and Hindu Endowments Board under cap. 271. The act has been found necessary because with the passing of the Administration of Muslim Law Act 1966[51] Muslim endowments have ceased to be under the control of the Board. The act in the main re-enacts the provisions of the earlier cap. 271 and the only new provisions of note are that the members of the new Hindu Endowments Board are to be Singapore citizens and that the Board is forbidden to permit any property under its control from being used for political purposes. 'Political purposes' is undefined. The interpretation section, with the removal of phrases including the word 'Muslim', remains the same.

In the states of Malaysia, outside Penang and Malacca, the position is not so clear. There is no specific Hindu endowment legislation and Hindu endowments are probably governed by the Trustees (Incorporation) Ordinance, 1952.[52] This provides for the incorporation of trustees for 'any religious, educational, literacy, scientific, social or charitable purpose' (section 2). The scope of this section remains uninterpreted.

There is, however, one problem which can arise in Malaysia and Singapore under both the current and proposed legislation. This concerns the validity of gifts made to a temple, admittedly a religious purpose, for its own upkeep and also for the benefit of an idol. The question is — is this a valid gift for the purpose of 'religion' in the current legislation? There is only one case on this point which was decided long before any of the present acts came into existence. In *A. G.* v. *Thirpooree Soonderee*,[53] a Penang case, it was held that a gift of money to a temple for the benefit of an idol was an absurdity and therefore not a valid trust.[54]

This decision is directly contrary to Indian cases on the point.[55] The reasons for this appear sufficiently from the two following cases. In *Sala Behari Singh* v. *C. I. T. West Bengal*[56] it was held that an idol is capable of possessing property which is administered for it by a *shebait* ('manager'). However, in an earlier Privy Council decision it was held that 'the possession and management of the dedicated property belong to the *shebait* and this carries with it the right to bring whatever suits are necessary for the protection of the property'.[57] The law looks upon the manager as both a trustee for the idol and a beneficial owner of the property of the endowment.[58] Whether or not we wish to admit that an idol has a distinct legal personality it is clear from the Indian authorities that an endowment in its favour is a valid gift. On these authorities, and on the analogy with the Chinese *sin-chew* cases, it is probable that the courts would interpret 'religious' to include idol endowments. To do otherwise would be inconsistent and a cause for legitimate complaint by the Hindu community.

The Hindu Joint Family

This is the most distinctive feature of Hindu law to be found in Malaysia and Singapore. For a definition of the joint family and the personal obligations arising out of it we cannot do better than to turn to the judgment of *Aitken J.* in *The Estate of T. M. R. M. Vengadasalam Chettiar decd.*[59]

> All property inherited by a male Hindu from his natural or adoptive father, father's father, and father's father's father is ancestral property; and it must be borne in mind that ancestral property can only be acquired by inheritance from a male paternal ancestor, and not by devise or gift *inter vivos*. The essential feature of all ancestral property is that the sons, grandsons and great grandsons of the person who inherits it, acquire an interest in it by birth. Their rights attach to it at the moment of their birth, and they and their father (or grandfather or great grandfather as

the case may be) become a joint Hindu family holding and continuing to hold such ancestral property as their joint family property as co-parceners until the co-parcenary is terminated by partition, or withdrawal of one or more members, or the relinquishment of his share by one or more members.

When once a Hindu family is joint it is presumed to remain joint until the contrary is shown. The normal state of a Hindu family is one of jointness.

Where any property is shown to have been once joint family property, it is presumed to remain joint family property until the contrary is shown.

All accretions to joint family property arising by way of income, or from its user in trade or business, become part of such joint family property.

Each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father, and, therefore, a transfer by a father of his own interest in the ancestral property cannot affect the interest of the son in the property.

In Hindu law a business — and the expression business includes the whole of a business or a share in it — is a distinct heritable property to his heirs. If he dies leaving male issues, whether natural or adopted, it descends to such issue. In the hands of such male issue it becomes joint family property, and the joint ownership so created between such male issue is not an ordinary partnership arising out of contract, but a family partnership created by operation of law.

Where a joint Hindu family is constituted by a father and his two sons, both the latter being under age, the father is the manager of the joint family property (if any) with wide powers of management, and he is also the *de facto* guardian of the co-parcenary interests therein of his two sons so long as they remain minors. Neither such powers of management, however, nor his position of guardian, enables the father to dispose of any part of the joint family property by will.

Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. It confers upon the adoptee the same right and privileges in the family of the adopter as those of a natural and lawful son, except in a few cases relating to the adoptee's marriage and his own rights to adopt.

Any adult Hindu may dispose of his own separate property by will or by gift or other disposition *inter vivos*, but no co-parcener, not even a father, can dispose of his undivided co-parcenery interest by will, even though the other co-parceners should consent to the disposition. The reason for this is said to be that at the moment of death the right of

survivorship of the other co-parceners is in conflict with the attempted disposition, and the title by survivorship, being the prior title, must prevail.

The following property constitutes the self-acquired property of a joint Hindu family, which he may dispose of by will or gift or other disposition *inter vivos*:

(a) Property acquired by inheritance from a lineal ancestor more than three degrees remote or from a collateral or from or through a female relation;
(b) Property acquired by gift or devise;
(c) Property acquired without detriment to the joint estate;
(d) Property which is the gains of learning or science acquired without substantial help from the joint funds; and
(e) Property which by its nature or extent or the mode of its acquisition is incapable of joint ownership.

Where self-acquired is blended with joint property in such a manner that it is impossible to separate the two, the whole may be presumed to be joint property.

This definition was accepted by both counsel in the suit and it appears to be largely based on Mayne and Mulla.[60] Some considerable space has been given to this definition because most of the decisions on joint family have been concerned not so much with the rights of the members *inter se* as with questions of the tax liability of joint family property for death duty purposes. There is, however, one exception to this in that in *Meenatchi* v. *Lall Singh and ors.*[61] the court was concerned to state whether or not a woman could be a *karta* or 'manager' of a joint Hindu family. It was held, relying upon Indian authority, that she could.

Returning to the definition of joint Hindu family property given above, the judge in *Vengadasalam's* case then asked himself whether or not these provisions of Hindu law should apply in the Straits Settlements. He came to the conclusion that they should. There were two grounds for this. First, the judge noted that certain provisions of French law as to community of goods had been given effect to in England[62] and, by analogy, he was prepared to extend a similar operation to Hindu law in the colony. The second ground was that the law relating to joint Hindu family property has always been given effect to, although no prior authority was cited for this.

Turning now to the question of liability of this property for estate or death duty, the courts have in general held that the property is exempt from duty. Thus, in *A. G. of Ceylon* v. *Arunachalam Chettiar*[63] the Privy Council held that under the relevant statute[64] this property is exempt from duty. This is rather an interesting decision

since the court spent some time in analysing the rights of the members of a joint family *inter se*. The court made the following observations. First, that the sole surviving co-parcener 'owns' the joint family property. However, this 'ownership' is of such a character that the female members of the family had a right to maintenance out of it and on the adoption of a son the character of this sort of 'ownership' is no longer present. Second, while the undivided family persists, property in the hands of a single co-parcener is the joint property of that family.

There is only one other case relating to joint Hindu family property and estate duty liability. In *State of Perak* v. *Muthukaruppan/Chettiar*[65] the court appeared uncertain as to whether or not duty should be levied on such property. This was probably due to the fact that the property was first admitted to be joint property but later found as a fact to be separate property. This decision is, therefore, not authority for any proposition on this point. However, in the recent case, *B.* v. *Comptroller-General of Inland Revenue*,[66] a Hindu joint family was assessed tax on the basis of the total assets.

Apart from the question of estate duty there are two further matters in respect of the Hindu joint family which have been litigated. In *Basapah* v. *Narayanan Chettiar*[67] the court was concerned to decide disputed issues in relation to the administration of a deceased estate. The question of joint family property was not specifically dealt with but the court noted that no representation is ever taken out in respect of the property of a joint Hindu family. This is in line with the rule in India that co-parcenary property cannot vest in an executor because it cannot be disposed of by will.[68]

The final case relates to the joint Hindu trading family. In *Nachiappa Chettiar* v. *K. AL. KR.*[69] the issue was the liability of the individual members of the family for the debts of the business. The court held that whether or not the business is ancestral or new, all adult male members who take an active part in the business are personally liable for debts. This decision was reached entirely on the basis of Indian authority.[70] There was also a secondary issue relating to the position of an infant in respect of the joint Hindu trading family. It was held that he does not necessarily become a member of the partnership which carries on business unless some definite benefit has accrued to him in excess of anything to which he otherwise would have been entitled. This result was reached by a consideration of Indian authority together with sections 247 and 248 of the Contract Enactment.[71]

'EXCOMMUNICATION'

Coopang Chetty v. *Veera Padiachee & ors.*[72] is the only reported decision from Malaya or Singapore in which caste was the central issue. The plaintiff was excommunicated from the defendants' caste and temple for refusing to undergo purification.[73] The excommunication was publicly announced and all persons were warned not to have any dealings with him. The plaintiff sued the defendants, who were the headmen among the Hindus of his area, for libel and slander. It was held that the excommunication and its publication was privileged by the occasion and, in the absence of express malice, no action was maintainable. It was held further that in so far as the publication of excommunication was made to members of the caste and temple it was privileged. In so far as it was made public to outsiders (who were neither prevented nor had in fact refused to associate with the plaintiff) he had suffered no special damage and the action therefore failed.

It may be useful at this point to summarize some of the significant differences and similarities between Hindu law and Chinese law in Malaysia.

(i) First, as pointed out at the beginning of this chapter, the body of Hindu law which has been found judicially applicable in Malaya and Singapore shows significant qualitative differences from Hindu law in India. Caste, for example, and general questions of succession and inheritance, have not been important. Other questions of family law have been important and to this extent the interaction process between Hindu law and the English law has been similar to the interaction process between Chinese customary law and English law.

(ii) Hindu law has been known and judicially accepted here on the basis of authoritative Indian material both legislative and descriptive. Though there have been attempts to use similar material in respect of Chinese customary law, these have been neither frequent nor successful.[74] Instead, the courts have proceeded on the basis of expert evidence together with (sometimes) what the courts have regarded as 'reasonable'.

(iii) In respect of Hindu marriages the courts have demanded only that the customary forms of marriage be suitable to the circumstances of the colonies and that they are appropriate in any particular case with respect to the caste and families of the contracting parties. This follows Indian practice and is clearly distinct from the requirements demanded in assessing the validity of Chinese marriages.[75]

(iv) On the question of the validity of marriages arising out of religious conversion from Hinduism to Christianity the court's practice shows a radical departure from the position on the Chinese. In both cases the question at issue was the status of the parties as to the marriage. The distinction is that Hindu conversion can effectively render the marriage a nullity whereas this need not necessarily be the case in respect of Chinese. The relevant legislation, and not simply religious adherence, will affect the status of a Chinese marriage.[76]

(v) The courts have refused to grant petitions for the restitution of conjugal rights in both Hindu and Chinese suits.

(vi) On adoption, the courts have recognized the rights of adopted children to succeed in any estate. But for a Chinese adoption to be recognized the courts have demanded that the intention of the testator to this effect must be shown. In a recent decision on this point the courts have further demanded that any adoption to be recognized must be one valid by statute.[77]

(vii) On the question of endowments in respect of Hindus this has been and is governed by statute at least in Singapore. Unlike Chinese endowment problems, the courts have not dealt with the question of perpetuities or with the *cy-pres* doctrine. The matter of idols is probably governed by Indian authority.

(viii) The Hindu joint family has no Chinese counterpart, at least in the Hindu family's trading and property holding functions. There are, however, some Hong Kong decisions on the firm trading under a clan name but these are not strictly comparable to the Hindu situation.[78]

(ix) Caste, being unknown to the Chinese in Malaya and Singapore, has never been raised in judicial proceedings. In comparison to India it seems to be of much less importance among the Hindu community here.

In conclusion, it is rather interesting to note that the applicability of Hindu law has never been argued on analogy with the applicability of Chinese custom. The reverse process has, however, been given judicial sanction. In *Re Native Witnesses*,[79] Indian Act V of 1840 which applied to Hindus and Muslims was extended by analogy to the Chinese[80] as 'natives'.

Hindu Moneylenders (Chettiars)

The *Chettiars*[81] are a part of the wider Hindu community and engage almost exclusively in moneylending and investment activities.

They are active in most parts of Malaya and Singapore though their main centres of activity are now probably Singapore and Kuala Lumpur. In this section we shall be concerned only with moneylending contracts. This has two levels of analysis. First, to describe the *modus operandi* of Chettiar moneylending, and second to describe the integration of these techniques with mercantile custom as this is understood by English law.

Chettiar Techniques[82]

The traditional form of deposit or loan (*Thavanai* or *Tavanai*)[83] takes the following form:

> We have credited to your account ... on.... As agreed between us the said amount of ... credited for twelve months *Thavanai* at the rate of interest being ... will be paid to your order in twelve months *Thavanai*.[84]

The relationship between the parties to this account is that of lender and borrower: the loan is made for a fixed and certain period at a rate of interest which is fixed at stated intervals (usually weekly or bi-monthly) by members of the Chettiar community. The lender cannot demand repayment before the end of the period and if he does not demand it at this time and if the borrower does not tender repayment then the loan is taken as being extended, at the current interest rate applicable, for a further period.

A point of interest here is the question of interest rates. These are fixed by members of the Chettiar community and apply to all contracts of loan made during the currency of that interest rate. The rates of interest, however, vary from time to time. But there is apparently some standardized procedure for variation. The rates may be fixed on par with the Madras rate (8½ per cent in 1958) or with the Penang rate which is fixed by the Penang Chamber of Commerce. These two rates are not necessarily the same and are themselves subject to slight alteration from time to time.

The moneylending business of a Chettiar firm is carried on either by the proprietor,[85] partner or agent, under a *vilasam* or 'initials', e.g. '*K.AR.KR.*' The letters are a shorthand term for referring to the firm. It is common practice for loans to be made and taken under authority of this form of letters only. The letters thus act as a sort of partnership signature. In many cases, however, the firm's initials are prefixed by the signature of one of the members and the precise status of this document has at times troubled the courts.

The final technique concerns the books of account kept by a Chettiar firm. There are at least nine books regularly kept. These are as follows:

(a) *Kai Chittai*: All receipts and disbursements are in the first instance entered in this book.
(b) *Chittai Kanaka Pustakam*: This consists of several books in which are entered small expenses such as travelling and sundry expenses.
(c) *Kurippu*: This is a day book into which all the above items are posted.
(d) *Baki Pustakam*: This contains total daily bank balances, chetty's account balance, debtors' balance, expenses and income.

The next three books are ledgers.

(e) *Nadappu Peredu*: current account.
(f) *Enathu Peredu*: debtors' account.
(g) *Kolmuthal Peredu*: property account.
(h) *Iyenthukai*: This is a balance sheet upon which monthly ledger balances are entered.

These accounts are all kept in bound books arranged in chronological order. They show every transaction into which the Chettiar firm has entered and their authenticity and reliability has been accepted by the Privy Council.[86]

In addition to Thavanai, initials, and account books, there are other facets of Chettiar mercantile custom in Singapore and Malaysia. It is not proposed to deal with these as they have never been judicially considered and are thus outside the scope of this book.

Chettiar Custom and the English Law

Before discussing judicial decisions on the procedures mentioned above it should be noted that the relevant legislation on moneylending[87] does not touch normal Chettiar loans where interest is payable in daily balances with monthly or more extended rests at a rate not exceeding 15 per cent.[88]

There are several cases reported which are directly on Chettiar contracts from the former Federated Malay States and Straits Settlements. The first case, *Nachiappa Chettiar* v. *Karuppan Chettiar & ors.*[89] deals with the question of partnership and the liabilities of the partners for the debts of a firm. The moneylending firm, '*K.AL.KR.*' was set up as part of a joint family enterprise and the question of liability on the part of an individual member was held by the judge to depend upon the provisions of the Contract Enact-

ment either under section 249 as being found in fact to be a partner, or under sections 245 and 246, by acting as a partner. After considering the Indian authorities on the point the judge concluded that where the member of a joint family[90] takes part in the formation, management, or conduct of the business then he has entered into a contract of partnership with the other members of the firm. He is thus personally liable as a partner, as well as being generally liable as a member of an undivided Hindu joint family.

The second point which arose in this case concerned the position of a member of the joint family who was a minor when the debts were contracted. The court again decided this question on the premise of the Contract Enactment (section 248). In the event, it was held that no claim would lie against him since he had not been admitted to any benefit of partnership, as demanded by the act, over and above the benefits to which he was entitled as a member of an undivided joint family. The court did not deal with the question of principal and agent. It was noted above that the firm styled itself, '*K.AL.KR.*' This style is known as its initials (vilasam) and the practice is, when entering into a contract of loan, for the document to be initialed in this way: this is often supplemented by the distinctive signature of the person issuing. Is this person then a principal or an agent? On this point the Privy Council has decided[91] that the signatory acts as principal. But there is authority to show that this may not in fact be the correct view. Thus in *M.V.V. Maya Nadan* v. *Arunachalam Chettiar*[92] such a signature was held to be the firm's signature and in *Mungumal Jessa* v. *A.L.V.R.C.T. Firm*[93] the court gave effect to a custom among the Nattukottai Chettiars that such a signature was a transaction of the firm; the signatory being agent only.

Finally, it has been held that where the name of a family idol has been placed at the top of a document and signed by a member of a family, then the idol's appellation is the effective signature.[94]

The second decision, *Letchumanan Chettiar* v. *Alagappa Chettiar*,[95] was concerned to establish the status of the *Thavanai* (or *Tavanai*) letter in terms of section 83 of the Bills of Exchange Act, 1882.[96] It was contended for the plaintiff that the instrument should be recognized by the law of England applicable in the Federated Malay States[97] as being negotiable; second it should be recognized as being negotiable among the Chettiars by custom and finally, that the plaintiff was the equitable assignee as evidenced by the document sued upon. The Tavanai letter took the following form:

Alagappan writes:

Cash received on this date is $3,000. We have credited this (sum of) dollars Three Thousand in your name on three months 'Tavanai' at ¾ interest. We shall receive this signed letter on payment of principal and interest according to 'Tavanai'.

(Sd.) A. L. V. Alagappa Chettiar.[98]

This was the translation considered by the Court of Appeal.

The court held, as to negotiability under the Bills of Exchange Act, that the document was not a promissory note. The ground for this was that the Tavanai letter did not contain an express or implied promise to pay. At the most, the court thought that it was a mere acknowledgement of debt. It also said that the principal could hardly be a sum certain because unpaid interest is added to the principal, the whole sum then carrying interest at the rate agreed upon. As to the second ground of appeal, that the letter is, by the custom of Chettiars, negotiable, the court found that it was not to be so regarded. The two reasons for this were that the letter was not in such a form which renders it capable of being sued on by the holder *pro tempore* in his own name. Second, the document did not in its terms indicate transferability. It was added, *obiter* (?), that the court should not recognize and give effect to a custom which is confined to a geographical area and to a certain community within that area.

As to the third ground, on equitable assignment, the court expressed no opinion. The full court concurred in the reasons given above in dismissing the appeal.

The next case in point is *Sockalingam Chettiar* (*alias*) v. *Palaniappa Chettiar*.[99] Here, there were two questions in issue, specifically in respect of Chettiar banking contracts. The plaintiff had opened an account with a Chettiar firm in the name of his sister by depositing therein his own money intending it for her maintenance and support. He drew on the account from time to time for her benefit but before it was exhausted she died. In course of time two different sums of money were placed in the hands of the banker. First, there was money on deposit (Thavanai), the agreement being that the money should be repayable on demand at any time after the expiry of three months from the date of first deposit. Interest was to be calculated and added to the principal every three months.

The second account was a current account drawn on the K.S.P. firm and placed to the credit of the plaintiff under an agreement that the money should be repayable on demand.

The court found that the relationship between the parties in respect of both accounts was that of banker and customer but that this did not necessarily imply the existence of any fiduciary relationship between the parties. The court considered the question as to when a cause of action for the recovery of a debt on a Thavanai is complete. In the event the court decided this on the basis that because the relationship is one between a banker and his customer, then the period of limitation[100] should only run from the date of demand and not from the date of the original deposit or loan.

There is one old case on the interpretation of a 'Chitty Insurance' bond. In *Mootoo Curpen Chitty* v. *Lee Toh*[101] the court found as a fact that this form of bond provided for the marine insurance of *goods* but to claim the insurance both the ship and the goods must be totally lost by foundering. This was held to be a valid bond and not void as being a policy of wager.

In addition to these cases directly involving Chettiar contracts there are two cases on commercial matters generally which should be noted. In the first of these, *Coomarapah Chetty* v. *Kang Oon Lock*,[102] it was held that a promissory note given on a Sunday was bad as falling within 29 Car. II, c. 7 (the 'Lord's Day Act') which prohibited borrowing on that day. The second case, *Murugappa Chettiar* v. *S. Seenivasagam*,[103] concerned the validity of a transaction analogous to an English mortgage. The respondent bought several pieces of land which were registered in the name of the appellant who had advanced the purchase money. The appellant had given the respondent a letter undertaking to re-convey on repayment of principal and interest. The money was not forthcoming and the appellant went into possession. The court held that this transaction was not a mortgage though it was analogous to it. In effect, the court held in respect of a claim by the respondent for mismanagement and neglect on the part of the appellant that the principles of the law of mortgage should be applied.

This completes our summary of the integration of Chettiar mercantile custom with English law. It is apparent from the cases that in this field of law there is no question of the two systems co-existing side by side. So far as Thavanai documents are concerned these are taken to be part of the general mercantile custom of Malaya and Singapore.

To this extent the adoption of Hindu law and custom provides a point of departure from the Chinese experience. This is probably almost totally explicable on the basis of the peculiar field of law — mercantile custom. It is obviously undesirable to

allow more than one set of mercantile custom to operate within the territorial limits of one state. At the same time, however, this policy should not be allowed to obscure the fact that the Chettiar commercial system is closely tied to other Hindu institutions, notably the joint family. In these circumstances the courts must continue to exercise some degree of caution so that questions as to the legal operation of these disparate (from the English law point of view) institutions are kept separate.[104]

One final matter may be mentioned which, although it does not directly involve Hindu law, is a part of a general custom relating to money involving the lower classes of Indian society in Malaysia. This is the loan fund known as *kutu*[105] which is strictly analogous to the Chinese *hwei* described in the last chapter.[106] There are two cases in point: the first, *Ramasamy* v. *Muniappan*,[107] was a suit on a promissory note where the court held that the objects of a money loan society and the contract between its members may give rise to civil obligations. Money lent to meet such obligations is a lawful consideration for a promissory note given in respect of any loan. At the same time, however, the court found that the group of people involved in the fund were acting illegally in that they were an unregistered society.[108] This decision was followed in *S. M. Ameer Batcha* v. *V. K. Kunjumon*[109] where a kutu was again declared to be illegal in view of the Societies Ordinance.

Summary

Two points for discussion arise from the main body of this chapter. The first is the virtual absence of any issue of caste and, by extension, matters of family and inheritance law which depend upon caste principles. In other words the courts have never had to consider substantive issues of Hindu law nor have they had to consider, except incidentally, the relation between a religious law and their own secular law.[110] Second, and related to this, the application of Hindu law has never given rise to that series of problems, for example polygamy and non-judicial divorce, to which the English law had to adapt itself in respect of other systems of personal laws. These facts cannot be explained on strictly legal grounds and we must turn instead to the history of Indian[111] immigration into Malaya and Singapore, focusing particularly on occupational and religious divisions within the immigrant community. Neither of these divisions necessarily followed linguistic lines.

The bulk of the immigrant population consisted of indentured labour employed on rubber and coffee plantations. This system was of course open to many abuses and it was not until 1911 that some attempt was made to provide for the welfare of these people.[112] This occupational position obtained even up until 1939 when out of over 700,000 Indians in Malaya only 4 per cent were engaged in trade, business or the professions. Thus, the great bulk of the Indian population were not affected by the law, being as it were beneath its notice, not least for financial reasons. Though it has been stated that caste discrimination and the treatment of the depressed castes constituted a problem[113] this never got to the courts. For example, marriage disputes were (are?) rather confined to the labour lines of the rubber estates, each of which constituted a small self-contained community,[114] containing probably people of the same caste.

In addition though there was a small part of the Indian population which was Western-educated and reform-minded, it was to a large extent an urban phenomenon and divorced from the labouring class. Even now there seems to be little intercourse between these two divisions. Though this group led a temperance reform movement it did not concern itself unduly with matters of Hindu law, with one exception. This concerned marriage, in so far as marriage was linked to the Hindu religion.

In the 1930s there was a move, eventually successful, to open the doors of all temples to people of all castes. The comparative ease with which this was accomplished is perhaps an indication of the weakness of caste distinction. Linked with this is the fact that the urban Indian has the opportunity to better himself economically and, in this rise in status, caste distinctions tend to become lost or, if not lost, then ignored. But differences in religious forms of worship never seem to have been connected closely enough to family law problems so as to come to the notice of the courts. Religious distinction between castes seems to have concentrated upon a distinction between different forms of worship and not upon substantive rights, such as those accruing under marriage, which result from a religious ceremony.

Returning to the position of the labourers living in the labour lines of rubber estates, one further point should be made. This is to record the fact of our almost total ignorance of dispute settlement and decision-making procedures in the labour line context. In addition we know little of the relation between religion and law here[115] and neither do we know the extent to which these people

are aware of and follow the relevant 'government law' on such topics as adoption, succession, divorce, and so on. As it is, the main body of this chapter contains all that exists of Hindu law in Malaya and Singapore on the official level.

1. For example, Indian precedent relating to the Hindu joint family has been adopted *in toto* in Malaysia (see below). In addition Indian precedent is freely cited in other cases; see, for example *Sv. P. Sivagami* v. *Sohan Singh* [1959] M.L.J. 3.

2. There was one (unsuccessful) judicial attempt to rely upon the laws of China; see *In Re Lao Leong An* (1893) 1 S.S.L.R. 1. However, in the recent case, *Mary Ng* v. *Ooi Kim Teong* [1972] 2 M.L.J. 18 the court accepted expert evidence as to the customs of South China. See Wee (1973) for a criticism of this decision.

3. The courts have dealt with commercial matters, most notably in Hong Kong, as something to be given effect to in spite of or outside common law. See, for example, *Li Chik Hung* v. *Li Pui Choi* (1911) 6 H.K.L.R. 12.

4. *sub. nom.*, *Pootee* v. *Valee Uta Taven* (1883) 1 Ky. 622.

5. (1895) 3 S.S.L.R. 58.

6. (1869) 1 Ky. 216 at 221 '... that law [the law of England] is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them ...' but see below on *Khem Singh* v. *Anokh Singh* [1933] M.L.J. 228.

7. [1940] M.L.J. 119.

8. Here the wife had left the husband supposedly because of ill-treatment; there was no formal divorce procedure.

9. This, interestingly enough, was stated in terms of the customs as practised by certain castes: the expert witness was at some pains to point out that as among Tamil Hindus customs may vary from caste to caste though not to any great extent — see report at p. 120.

10. For the position in similar cases in India reference should be made to Jain (1963). A useful shorthand account is given in the judgment in *Abdul Hussain* v. *Sona Dero* (1917) 45 I.A. 10.

11. [1953] M.L.J. 147.

12. [1959] M.L.J. 251.

13. (1895) 3 S.S.L.R. 58.

14. [1933] M.L.J. 228.

15. In *Rajeswary and anor.* v. *Balakrishnan and ors.* (1964) 3 M.C. 178 it was held that such contracts are not ones for immoral or illegal purposes.

16. Because of the provisions of the Women's Charter (Ordinance 18 of 1961 as amended by Ordinance 9 of 1967).

17. [1930] S.S.L.R. 218.

18. Adopted from Trevelyan, *Hindu Law* (3rd edition) at pp. 45, 64.

19. *Ramasamy* v. *Public Prosecutor* [1938] M.L.J. 137, *Maniam* v. *R. Rajoo* [1958] M.L.J. 145.

20. *Hurbajan Singh* v. *Public Prosecutor* [1952] M.L.J. 83. A domicile in India at the time of writing would of course subject this matter to the provisions of the Hindu Marriage Act, 1955.

21. *Paramesuari* v. *Ayadurai* [1959] M.L.J. 195.

22. (1964) 3 M.C. 178.

23. *Khimji Kuverji* v. *Lalji Karamsi* A.I.R. 1941 Bom, 129.

24. See Derrett, 1963: 140–2 for the Indian authorities. See also S. K. Chan (1961) on the minor's capacity to sue for breach of promise to marry.
25. Federated Malay States, Proc. of the Federal Council, 1929, B149.
26. Often the managers of plantations.
27. Arasaratnam, 1970: 69 citing the Annual Report for the Agent of the Govt. of India, 1928, p. 21.
28. *Mary Joseph Arokiasamy* v. *G. S. Sundram* [1938] M.L.J. 4.
29. [1947] S.C.R. 22.
30. Excluding of course Chinese customary marriages involving polygamy which are recognized. cf. *Kho Leng Guan* v. *Kho Eng Guan* [1928–41] S.C.R. 60.
31. (1939) 1 M.C. 51.
32. See Hooker, 1968: 59–65.
33. I.L.R. (1907) 30 Mad. 550.
34. I.L.R. (1910) 33 Mad. 371.
35. See Hooker 1968: 64 on the discussion of *Re Ding Do Ca* [1966] 2 M.L.J. 220.
36. (1911) Wood's Oriental Cases 38.
37. (1871) 1 Ky. 236.
38. cf. *Choi Wai Ying* v. *Cheong Weng Chan & ors.* [1933] M.L.J. 301.
39. (1911) Wood's Oriental Cases 41.
40. (1866) L.R. 1 P. & D. 130.
41. [1954] M.L.J. 175.
42. [1956] M.L.J. 183.
43. *Varada Narayama Aiyangar* v. *Vengu Ammal & ors.* I.L.R. 1938 Mad. 621.
44. *Soundara Achi* v. *Kalyani Achi & ors.* [1953] M.L.J. 147.
45. Cap. 271 laws of the colony of Singapore 1955 incorporating cap. 175 revised laws of the Straits Settlements.
46. Cap. 175, revised laws of the Straits Settlements remains in force in Penang and Malacca by virtue of the Transfer of Powers Ordinance (F.M. 1/1948). Cap. 175 has been amended by No. 25/1956 though not in substance.
47. cf. note 46 above.
48. [1957] M.L.J. 139.
49. [1961] M.L.J. 187.
50. Hindu Endowments Act 30/1968.
51. No. 27/1966.
52. No. 73/1952.
53. (1874) 1 Ky. 377.
54. This decision should be compared with decisions given at about the same period on the Chinese customary law relating to *sin-chew* (ancestor worship). Endowments for this purpose, where they can be proved to be certain and not to infringe the rule against perpetuities, have been held to be valid trusts. cf. *Ong Geok Neo* v. *Chee Hoon Bong & ors.* (1893) 1 S.S.L.R. 53.
55. For example, cf. *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1925) 52 I.A. 245 (Privy Council).
56. (1951) 19 I.T.R. 430.
57. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* 31 I.A. 203.
58. See Derrett, 1963: 497 and the cases there cited.
59. [1940] M.L.J. 155 at 158–9.
60. See above, note 58.
61. [1953] M.L.J. 227.
62. *De Nicols* v. *Curlier* [1900] A.C. 21.
63. [1958] M.L.J. 43.
64. Section 73 of the Ceylon Estate Duty Ordinance No. 1/1938.
65. [1938] M.L.J. 247.
66. [1973] 1 M.L.J. 123.
67. [1935] S.S.L.R. 316.

68. *Ujambai* v. *Harakchand Govindji* (1935) 59 Bom. 644. See also the Hindu Succession Act 1956 s.6

69. [1939] M.L.J. 217.

70. cf. report at p. 219.

71. Cap. 52, revised laws of the Federated Malay States, 1935.

72. (1888) 4 Ky. 364.

73. He was ordered to purify himself from contamination contacted through sleeping with a woman belonging to a lower caste.

74. cf. *In Re Lao Leong An* (1893) 1 S.S.L.R. 1.

75. cf. *Seow Beng Hay* v. *Seow Soon Quee* [1933] M.L.J. 111, on the types and standards of proof required.

76. cf. *In Re Loh Toh Met decd.* [1961] M.L.J. 234 — see also a comment on this case in (1963) 5 *Malaya Law Review* pp. 383–7.

77. cf. *Re Loh Toh Met decd.* [1961] M.L.J. 234.

78. cf. *The Tung Sang Wing Firm* v. *Chow Chun Kit* (1910) 5 H.K.L.R. 238.

79. (1840) 2 Ky. 15.

80. Authority to so extend was found in 9 Geo. IV, c. 74, s. 36.

81. Chettiars are governed by the *Mitakshara* school of law. They are classed as *sudras* in the hierarchy of the caste system. Chettiars in India are mostly engaged in various forms of trade, notably money-lending and banking. Malaysian Chettiars are Nattukottai Chettiars. For a description see Thurston, 1909: (5) 249–71 and Arasaratnam 1970: 36–7, 92–6.

82. These have been admirably summarized in Das (1958).

83. *Thavanai* means 'period' or 'time'. Evidence is admissible to determine the exact meaning of this term in any suit.

84. Taken from Das (1958). This should be compared with the form given below and judicially considered.

85. Which can be a joint family.

86. *Tewari Jaswant Singh* v. *Lala Sheo Narain Lal* 21 I.A. 6.

87. In Singapore, the Moneylenders Ordinance, No. 58/1959 as amended by No. 19/1967. In Malaysia, the Moneylenders Ordinance, No. 42/1951 as amended.

88. Section 16 (5) Moneylenders Ordinance.

89. [1939] M.L.J. 217.

90. cf. the definition of joint family given above.

91. *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* [1926] A.C. 761 at 763–4.

92. A.I.R. 1926 Mad. 1106.

93. 4 M.L.T. 309.

94. *Chidambaram* v. *Ramasami* 27 Mad. L.J. 631.

95. [1934] M.L.J. 50.

96. ' A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.'

97. Any issue relating to mercantile law must, under section 5 of the Civil Law Ordinance (cap. 42 revised laws of Straits Settlements 1936), be decided according to the law of England.

98. This translation differs from that before the trial judge which ran as follows: 'Written by Alagappa. Received on this date $3,000 cash. This sum of three thousand dollars has been credited to your account as payable at the end of three months with interest at the rate of ¾%. Having paid interest and principal according to the time specified, I must get back this manuscript letter.'

99. [1934] M.L.J. 207.

100. In this case the relevant legislation was the Limitation Ordinance (now 4/1956) Arts. 41 and 42.

101. Wood's Oriental Cases (1911) Appendix III.

102. (1872) 1 Ky. 314.

103. [1936] M.L.J. 217, [1940] M.L.J. 217 (C.A.).

104. On the other hand this has not prevented the Hindu joint family from being assessed tax on the basis of the total assets; see *B.* v. *Comptroller-General of Inland Revenue* [1973] 1 M.L.J. 123.

105. Or *kuthu, koottu.* Also known in Kerala and Travancore as *kuri, chitti.*

106. *cf.* pp. 129–31.

107. [1940] M.L.J. 290.

108. By virtue of s. 10 of the Societies Enactment c. 96 revised laws of the Federated Malay States.

109. [1959] M.L.J. 59.

110. This is in marked contrast to the position in India, cf. Mulla (1966).

111. 'Indian' is used here as a blanket term and includes the following linguistic divisions in the total Indian community: Tamil 80 per cent; Telegu 4 per cent; Malayalees 7 per cent; North Indians 9 per cent.

112. This was attempted through legislation. See Arasaratnam, 1970: 49–57 for a summary.

113. See Arasaratnam, 1967: 55, R.K. Jain (1968).

114. See Kernial Singh Sandhu (1969).

115. However, data are now becoming available: see Kernial Singh Sandhu (1969) and the sources there cited.

7

THE ORANG ASLI

Introduction

THIS chapter is concerned with the aboriginal peoples of Malaysia now referred to as the Orang Asli. The personal laws of these people have never, to the writer's knowledge, come before the courts in Malaysia; so far as legislation is concerned there is only one federal enactment and this is solely concerned with the preservation of the *status quo* (see below). It is necessary, however, that some consideration be given to the Orang Asli in this book simply because these people are going to come into contact with the formal legal system in the developing economic and social contexts of modern Malaysia. To some extent what will be said in later sections of this chapter is speculative jurisprudence in that the data adduced are taken from social science rather than from case and statute. But the courts themselves are going to have to rely upon such data and the description given here will at least have the merit of indicating sources.[1] In addition it is proposed to draw attention to the major problems which are bound to arise in the courts.

The Orang Asli are classified into three main groups for census and administrative purposes; these are as follows:

THE NEGRITO

These peoples (Kintak, Kensiu, Jahai, Men Driq, Batek, Lanoh) are concentrated in the states of Kedah, Perak, Kelantan, Trengganu and Pahang and total, at the 1965 census, about 1,440 persons. They are primarily deep jungle dwellers whose way of life is traditionally hunting and gathering, although more settled ways of life are now being introduced.

THE SENOI

This is the largest single group of Orang Asli totalling, at the 1965 census, 26,860 persons concentrated mainly in Perak, Kelantan and Pahang. They comprise the following named groups: Temiar, Semai, Che Wong, Jah Hut, Semoq Beri and Mah Meri. The

Temiar and Semai form the bulk of the Senoi people. In habitat they range from deep jungle dwellers carrying on a swidden agriculture[2] to more or less settled peasants found particularly in lowland Perak.

THE ORANG MELAYU ASLI

This class is sometimes referred to as 'proto-Malay' and is made up of the following groups: the Temuan Belandas, Semelai, Jakun, Temoq, Orang Kanaq, Orang Seletar and Orang Kuala. The Orang Melayu Asli number, at the 1965 census, about 1,250. The habitat ranges from jungle dwellers and peasant farmers to sea dwellers (the Orang Seletar and Orang Kuala of Johore).

The Orang Asli peoples vary widely in language, religion and way of life. There is no such thing as a 'typical' Orang Asli culture and the wide degree of cultural variability is an important fact which must be kept in mind by the administrative and judicial authorities. This is important not just because the legislation on the Orang Asli draws no distinction between the various groups but also, and primarily, because each of the aboriginal peoples has its own culture and its own problems and difficulties in adapting to modern Malaysian life.

Legislation on the Orang Asli

The legislation is the Aboriginal People's Ordinance, No. 3 of 1954. There have been two amendments, one in 1958 (Legal Note 332/1958) and one in 1967. The amendment of 1958 makes no substantial change to the main Act though that of 1967 does: this amendment (No. 16/1967) will be considered together with the main Act.

The more important provisions of the principal ordinance are as follows:

Section 3:

This section defines an aborigine as follows:

(i) A person whose male parent was or is a member of an aboriginal ethnic group (this includes a group which a Ruler in Council in a State may declare to be such — S. 2), who speaks an aboriginal language, follows an aboriginal way of life and aboriginal customs and includes a descendant through males of such a person.[3]

(ii) A person of any race who was adopted by any aborigine when an infant and who complies with the foregoing definition.

(iii) The child of any union between an aborigine female and a male of any race who also complies with the definition in (i) above.

An aborigine does not cease to be such because he has ceased to adhere to aboriginal beliefs and has become a member of any religious body.

Finally, a question as to whether a person is or is not an aborigine shall be decided by the Minister with responsibility for aboriginal welfare (S. 3 of No. 16/1967).

Section 4:

The original section of No. 3/1954 provided that aboriginal affairs should be administered by the Government of the State or Settlement in which an individual was permanently resident. If he was resident in more than one State or Settlement then his affairs should be administered by the Government of the State or Settlement in which he was residing for the time being.

This paragraph is now entirely omitted from the new S. 4 (see S. 4 of No. 16/1967).

The rest of the new S. 4 retains the provision allowing an aboriginal headman to exercise his authority in matters of aboriginal custom or belief.

Section 5:

The new S. 5 (S. 5 of No. 16/1967) makes the conducting of research into any aspect of aboriginal life a part of the Commissioner's functions under the Ordinance.

Section 6:

This section deals with the administration and setting up of 'aboriginal areas'. This is an area predominantly or exclusively inhabited by aborigines. Such land shall not be declared Malay Reservation Land, nor shall it be declared an animal sanctuary, nor shall it be sold or alienated, nor shall any licences be granted for the collection of forest produce to any person not an aborigine.

Section 7:

This section sets up 'aboriginal reserves'. This land is land exclusively inhabited by aborigines (see S. 6 above where the terminology used is 'predominantly or exclusively inhabited'). There are the same limitations on land use as in S. 6 above.

Section 8:

This section sets out rights of occupancy to aboriginal reserves or areas. These rights may be granted to an individual, a family

or to any member of an aboriginal community. The only title which can be held is that of a tenant at will and no aborigine may transfer, lease, charge, sell, mortgage or assign any such land without the consent of the Protector.

Section 14:

This section relates to the exclusion of persons from aboriginal areas and reserves. Under S. 6 of No. 16/1967 the Minister may, having regard to aboriginal welfare, prohibit any persons from entering or remaining on such land (see also S. 15).

Section 16:

This section confirms the position of a headman, whether hereditary or not, subject to confirmation by the Ruler of the State. The Ruler may also remove any headman from office.

Section 19:

This section sets out the regulations which may be made by the Ruler in Council in a State and which will govern aborigines. These include:

(a) the creation and regulation of aboriginal settlements within aboriginal reserves and areas but only with the consent of the state governments (S. 8 of No. 16/1967);
(b) prohibiting entry into aboriginal reserves or areas;
(c) providing for the appointment of any headman, prescribing his qualifications and detailing the method of appointment;
(d) providing for the registration of aborigines;
(e) providing for the recording of rights of occupancy granted
(f)(g) to aborigines under this Ordinance but only with the con-
(h)(i) sent of the State Government (S. 8 of No. 16/1967); providing for the regulation of planting, felling, taking of produce and animals within an aboriginal area but only with the consent of the State Government (S. 8 of No. 16/1967);
(j) providing for aborigine schools;
(k) prescribing the terms and conditions upon which aborigines may be employed;
(m) prohibiting the entry of any written matter into an aboriginal area;
(n) prohibiting the sale or gift of intoxicating liquor to aborigines;
(o) imposing penalties for breaches of the Ordinance.

This legislation should be read together with a policy statement made by the Federal Minister of the Interior in November 1961. (*'Statement of Policy Regarding the Administration of the Aborigine*

Peoples of the Federation of Malaya' — published by the Department of Information, Federation of Malaya, Kuala Lumpur, 1961.)

After drawing attention to the cultural differences which exist between those aborigines who live in the heart of the jungle and those who live on the fringes the report lays down the following principles:

(a) The aborigines should be protected only so long as is necessary, i.e. until they can enjoy 'the benefits of the laws of the country'.
(b) The object of governmental development of aborigines is towards integration and not assimilation. Recourse to force in this aim is excluded.
(c) The retention of the aborigines' own customs shall be allowed so far as is possible except where these are incompatible with 'the national legal system'.
(d) Aborigines will not be removed from their traditional areas without their full consent.
(e) So far as education is concerned, there should be provision for the teaching and preservation of aboriginal 'dialects'.
(f) Special training facilities should be provided so that necessary training can be given 'for occupations for which they have traditionally shown aptitude'.
(g) Health services should be provided.
(h) Handicrafts and rural industries should be encouraged but should be consistent with aborigine 'artistic values' and cultural expression.
(i) Other elements of the national population shall be educated so as to eliminate prejudices against the aborigines.
(j) In all matters touching the welfare of the aborigines, they or their representative shall be consulted by Government.

The legislation and the policy statement are of comparatively recent date though some 'protection' of aborigines had been carried out by the former colonial government. Because these documents are so recent and because they have not been judicially interpreted, it would be presumptuous to try and state their exact meaning and effect. Neither legislation nor policy statement attempt any more than broad statements of intention, while each provides some machinery for future action. However, the legislation and the policy statement must be recognized as documents of primary importance in any study of Malayan aborigines. When they are read in the context of increasing educational and job opportunities for aborigines, the following points emerge.

First, there is no such thing in Malaysia as a traditional untouched aboriginal community: the policy statement itself makes this fairly

obvious point. Instead there are a series of disparate groups in differing stages of acculturation with Malays and Chinese together with overlying state and federal government administration.

Second, section 8 of the ordinance makes provision for the individual ownership of land within an aboriginal area or reserve. Third, section 3 of the ordinance now leaves in the sole discretion of the Minister the determination of who is or is not an aborigine. No doubt the Minister would rely upon the advice of the *Pejabat Orang Asli* (Department of Aborigines) but the act itself does not provide any criteria for determining this question.

The policy statement, however, seems to imply that an aborigine will no longer be regarded as such when he can enjoy 'the benefit of the laws of the country'. What does this mean, especially in view of the fact that the legislation does not tell us at what point a man ceases to be an aborigine? Is there, for example, any valid legislative distinction between an up-river Malay and his Semai neighbour who may speak Malay well, be just as permanently settled, send his children to a local school and have a more or less equal economic status? The only possible distinction at the present time is that the Malay is a Muslim.

These comments raise in summary form the two major questions in contemporary aboriginal life, economic status and religious adherence. As to the first, it is generally true that within the context of a modern cash economy the Orang Asli find themselves economically depressed. This is primarily a consequence of non-participation in those economic activities which have a central place in the economic life of the country. By and large the only participation in the cash economy involves the collection and sale of some jungle produce (fruit, rotan, etc.) and a little rubber tapping.[4] In both these activities the Orang Asli are very much at the mercy of the larger traders. The *Jabatan Orang Asli* has and is attempting to do something about this but it has neither the resources nor the expertise to cope with the marketing problems of the Orang Asli.[5] In addition, some attempt has been made to provide model settlements with agricultural assistance and animal husbandry schemes but these benefit only a small proportion of the rural Orang Asli. The deep jungle dwellers — about 60 per cent of the whole — remain unaffected.

The second question, that of religion, is more complex and less easy to grasp properly. The problem appears to consist of a presumption that because the Orang Asli are not historically members of any of the great world religions, thus 'pagan', it follows that they

are of little intelligence, ability or capacity for 'civilization'. The Orang Asli 'problem' is therefore seen in some quarters as a religious problem; conversion must, it is thought, bring the benefits of civilization and enable easy integration of the Orang Asli into society. This view is simplistic in the extreme, ignoring the economic question and dismissing out of hand the cultural values of the Orang Asli. From the writer's admittedly limited experience in one Semai community the culture contains features which are wholly admirable including, for example, a stress upon non-violence and a highly complex adaptation to the ecology, both natural and human, of Malaysia. To dismiss this out of hand would be an action founded upon ignorance and prejudice not least because the culture is flexible and sophisticated enough to provide a vehicle for Orang Asli adaptation to the facts of contemporary life. It is to be hoped that the legal system of Malaysia will prove equally adaptable.

The Orang Asli and the National Legal System

The data in this section are drawn from contemporary work on the Senoi peoples of Kelantan and Perak. Although the data are confined to these peoples (i.e. to the Temiar and Semai who together make up the bulk of the Senoi) the particular questions raised are likely to be the same throughout Malaysia.

The Definition of Orang Asli

This is clearly a major question; the legislation determines this by reference to parentage, including parentage through a female alone *plus* an ability to speak an aboriginal language and the following of an 'aboriginal way of life'. The two essentials therefore are descent and an adherence, to some unspecified degree, to aboriginal culture. Leaving aside the question of descent for the moment, the cultural qualification may present some difficulty. The assumption lying behind this qualification is that of a static culture — that something called an 'aboriginal way of life' can be determined both now and in the foreseeable future. The fact is that although this is to some degree true at the moment, at least for the deep jungle dwellers, it is by no means true for some of the lowland peoples of Perak, Selangor and Negri Sembilan. It is difficult in individual cases known to the writer to determine easily the identity of the social group to which they belong. Many speak Bahasa Malaysia fluently and local adats (in this sense usage) of the Malay and Semai may be practically indistinguishable. For example, in Semai settlements along the Sg. Bernam a spouse who feels wronged is

supposed to seek satisfaction from his or her spouse's mother's younger brother. This is a fairly sure sign of matrilineal Minangkabau influence. In this case, the adat of the Semai settlement is closer to that of the neighbouring Malay[6] than the latter is to more distant Malay settlements. This is not an isolated case. A further aspect of the same problem is that the *Jabatan Orang Asli* (Dept. of Aborigines) is pushing ahead with land settlement schemes in the rural areas. These schemes involve the clearing and planting of land and participation in cash cropping. This is a way of life similar to that of neighbouring Malay peasants and the Orang Asli, like the Malays, will begin to accumulate property and capital in some form. On the death of the first generation accumulator the claimants to such property will be faced with distribution proceedings in the local District Office. Although such proceedings may, in the majority of cases, merely involve official approval of an already agreed scheme of distribution, in some cases disputes will inevitably arise. This is going to set problems for the District Officer and it is unlikely that 'aboriginal way of life' will be of much help to him. The probable solution will be the finding of some adat; although this will solve individual problems it is taking us a good way from the terms of the legislation itself. A more serious possibility, probably still some way into the future, is that disputes of this sort will reach the High Courts in the states and directly involve questions of way of life and definition of Orang Asli which the court will be duty bound to determine. The possibility of variant definitions over the country is only too likely.

A further aspect of the definitional problem, again concerning the 40 per cent of the Orang Asli who are rural dwellers, is inter-racial marriage. There are several cases known to the writer all involving Semai women and Chinese men in Perak. These are not casual liaisons but marriages according to the forms and rituals of Chinese custom in the area. These marriages are not of course marriages at Chinese law as such because one of the parties is not Chinese, but they are perfectly valid on past authority.[7] But what of the offspring of such a marriage? According to statute they can be classed as Orang Asli by descent but problems will occur with the question of 'way of life' and the courts will have difficulties similar to those outlined above.[8]

The final aspect of who is an Orang Asli arises in the case of conversion to Islam. While the courts will not generally look to motive in cases of conversion they may be forced to in the case of the Semai. The Semai attitude to religious adherence is tolerant,

not to say eclectic; there are Semai known to the writer who claim to be simultaneously Methodist, Bahai and Muslim! The problem is that Islam is an exclusive religion, the adherents to which are governed by Islamic law legislation in the states of Malaysia. Although Islam provides for apostacy it does not provide for persons who 'are Muslim' at one time and not another or for one purpose but not another. The Semai of lowland Perak, for example, are generally not Muslim for purposes of receiving government aboriginal rations. Although the legislation provides that religious adherence does not affect the definition of Orang Asli, religion may very well be a factor in determining a way of life. Further, the Orang Asli problem is often seen as a religious problem and this view, as already indicated, will almost certainly result in cases of cultural conflict which the courts will find difficult to settle.

The questions raised so far are to some degree speculative in the sense that there has been no judicial examination of them. But this does not debar us from at least indicating some of the more obvious difficulties which may exercise the caveats. Government policy for the Orang Asli is at the moment directed toward integration and economic advancement; it is likely that this policy will result in the courts being required to develop a new set of personal law precedents.

Land

The second major problem which is likely to exercise the courts in the future is land. Apart from general questions of distribution and inheritance, which were touched on above, the conception of land held by the Senoi peoples is not that underlying the provisions of the legislation. So far as the latter is concerned the area of state land occupied by the Orang Asli is public domain and the greatest title which the Orang Asli can get, either as an individual or as a group, is tenant at will. There is no power in any Orang Asli to lease, charge, assign or mortgage such land although some dealings are possible with the consent of the Protector. Needless to say, such subtleties are quite unknown to the Orang Asli themselves whose attachment to 'their' land is passionate, not less so for being largely unexpressed. Land as such cannot be owned and no one group can claim rights over it as against another group. All that may be owned is the produce of the land both cultivated and (in some cases) wild. This is common to all the Senoi peoples and it is a strikingly different idea of land from that of the legislation which,

based upon an English law formulation, proceeds by way of registerable interests.

However, for one group of Senoi, the Temiar (and probably the Semai as well), the land which they occupy has an even greater significance. There are certain crops, such as seasonal fruit trees, which persist indefinitely and rights in these are rigorously maintained. These fruit trees are the only material link between contemporary Temiar and areas of past occupation. The significance of this is that when Temiar die their personal name is by taboo no longer used to refer to them; instead they become known by the name of the area of past occupation where they died, which in turn is defined by a reference to the fruit trees. These trees are, therefore, not just the joint property of each member of the contemporary generation but also act as a genealogy of descent for living persons.[9] They are re-statements of each group's land attachment with all the emotional and religious overtones which this implies.

The legislation, of course, takes no account of this, nor can it really be expected to, but this is not to say that economic development programmes and the indiscriminate acquisition of land by the state governments should proceed on an *ad hoc* basis. It is not merely the acquisition of land which is in question but the disruption of a coherent and complex social organization. There has already been significant change in the lowland and rural areas, including the introduction of maps setting out each group's 'own' area of occupation.[10] The main effect of such changes has been to introduce a crisis of identity; so far as the courts will be concerned this is another facet in the determination of who or what is an Orang Asli. Change is inevitable of course but the court must be prepared to face difficult questions in this field. The problem is not made any easier by a past history of land grabbing some of which seems to have had at least tacit government support.[11]

Personal Obligation

The bases of personal obligation among the Orang Asli are the respective kinship systems. These are complex[12] and, in some cases, not fully investigated. It is likely that the courts will have to consider at least some of them in the foreseeable future as economic development increases its impact in the rural area. This is going to pose considerable problems because in some cases, for example the Senoi peoples, personal obligation cannot be fitted easily into the categories of Malaysian common law. Classes such as 'legitimate', 'bastard' and 'adultery' are missing; [illegible] is not generally

formalized in the contractual sense and persons enter into unions and dissolve them with little formality. On the other hand, in some of the lowland areas, a greater degree of formality is often practised. Such marriages show elements of Malay influence of which perhaps the most important is the payment of *belanja*. So far as the Orang Asli in general are concerned it is essential to recognize that the methods of formulating personal obligation vary widely. Indeed they may vary as between persons who are classed as belonging to the same group. For example, there are important differences between east and west Semai. Therefore it will not be open to the courts to adopt or expound principles of personal obligation without a good deal of qualification in individual cases. The Malaysian common law starts with a hundred years of experience in the process of formulating the personal laws, each of which has now achieved some degree of certainty. This present state of the personal laws should not be allowed to over-emphasize the search for judicial certainty at the expense of the marked and extensive variations in the Orang Asli systems of personal obligation. In many cases the apparent 'rules' which determine obligation are not rules at all but signposts which the individual may or may not follow in specific circumstances.[13] They are certainly not rules of law. The formation of precedent is thus likely to be difficult; however, in matters of personal law the courts have never unduly straitjacketed themselves in this respect despite the odd lapse.[14]

Evidence

It may seem odd to end this chapter with a section on what is by any standards a difficult and rather technical category in the common law. However, there are at least two reasons why this is necessary. First, the courts are only able to come to a proper conclusion on the basis of evidence of a required standard of quality and quantity. Second, the nature of this evidence is peculiar in Malaysia and is likely to provide some difficulty within the terms of the Evidence Ordinance,[15] itself largely based on English legislation. Its peculiarity arises because, apart from scattered books and papers of varying quality and accuracy, the evidence put forward in contemporary cases will be almost entirely opinion evidence. This is defined, in section 45 of the ordinance, as evidence by experts on foreign law, science, arts and so on. Experts are 'persons specially skilled' in the particular field of study. The enumeration of subjects in section 45 is not very helpful because the words 'science' and 'art'

can be construed as extending to any field of study other than the law administered in the court concerned. In addition to experts properly so called, certain persons with 'special means of knowledge' can give opinions on the usages of any body of men or family, the constitution of any religious or charitable foundation, or the meaning of words peculiar to a locality or people.[16] Further, section 51 enables a person expressing an opinion to state the grounds on which he holds that opinion. This has been construed as a mandatory provision resulting in opinion evidence being regarded as worthless unless the grounds upon which the opinion is held are also stated.[17]

Within these sections of the ordinance, as applied to the facts of Orang Asli life, two difficulties are likely to arise. First, there is the general proposition that any assertion must be, by evidence, admissible at Malaysian common law. No lawyer would disagree with this but it does raise one important point, that of hearsay evidence. The problem here is that evidence as to the social organization of an Orang Asli group might be given which is based upon the statements of persons since deceased. This of course is normally admissible as a matter of general reputation[18] but it may well be contended that the rights or obligations brought forward are not such as to be cognizable to the common law of Malaysia. That the common law had no knowledge of and cannot recognize rights of the kind being put forward. The objection to this argument is that the law of evidence does not function by way of anticipating a decision of substantive law upon the facts which the evidence in question seeks to prove. Admissibility does not depend upon the proof of rights which the law has already exercised. It should also be remembered that the Aboriginal People's Ordinance accepts the principle that indigenous systems of obligations are the operative systems and, therefore, the rights put forward in the courts are not likely to be familiar to the Malaysian common law as it now stands. Further, and taking into account the notorious fact that the Orang Asli (unlike other groups in Malaysia) have no writing it must be clear that an exception to the hearsay rule, possibly upon the ground of reputation, is necessary. There are sufficient analogies within the other personal laws of Malaysia which provide precedents in this case.

The second point arising from the Evidence Ordinance which might give rise to difficulty is the question of expert evidence as such. In the case of the Orang Asli this will involve evidence given by anthropologists on the social organization of the Orang Asli groups. The objection to this evidenee is that it may well consist not just

of observation of Orang Asli social organization but also of statements made by informants to the anthropologist and thus infringing the hearsay rule. This objection may be rebuttable by remembering that the processes normal to the field of study of anthropology necessarily require statements by informants. This is a normal feature of anthropological investigation but it is also only a part of an anthropological description. The evidence given by the expert can only be looked at as a whole and not divided into parts. The fact that the distinction between 'fact' and 'opinion' is not apparent to a layman is not relevant to the case of the Orang Asli where the 'facts' supplied by the expert are in no way notorious or known.

A final objection may be that the experts tend to apply unwarranted concepts of their own to the actual facts of Orang Asli behaviour. They may, in talking in terms of such concepts, anticipate the findings of the court on the issues before it. Now apart from the fact that anthropologists themselves are well aware of this danger, it seems that the proper function of an expert witness is to talk in terms appropriate both to his field and to the court's understanding. The weight to be given to any proposition is a matter for the court, that is, it is a matter of law and as such not to be decided upon by a mechanical application of the evidence rules.[19] These difficulties can be avoided by remembering that evidence may be considered either as the facts themselves or as the methods used to bring them to the notice of the tribunal. It is the latter to which the rules of the law of evidence refer and it is here that admissibility is in question. The nature of the facts themselves is likely to raise only the questions of relevance and, so far as the Orang Asli data are concerned, there is probably little if anything which the courts will be disposed to reject on this ground. The only possibility foreseeable at the moment is the rejection of facts from one Orang Asli culture in proceedings where the parties are from some other group. A rejection of such facts on the point of relevance would here be quite rightly exercised.

1. Much nineteenth and early twentieth century work is to be found in the *Journal of the Indian Archipelago and East Asia*, *Journal of the Royal Asiatic Society, Straits Branch*, and in authors such as Skeat & Blagden (1906), Wilkinson (1913), Evans (1927, 1937), Schebesta (1927) and Noone (1936). The only work specifically to mention law as such is Skeat & Blagden 1906: (i) 494–520 but this must be treated with some caution.

In the post-war period summaries have been provided by Williams-Hunt (1952) and Carey (1961). Detailed data is at present available only for the Temiar

(Benjamin 1966, 1967) and the Semai (Dentan 1968), although field-work is in progress on other groups. The *Federations Museums Journal* is a useful source for both older and current work.

2. 'Swidden' — impermanent fire-cleared fields which are cropped for shorter periods (in terms of seasons) than those in which they lie fallow.

3. This section is based upon an earlier definition in the Perak Aboriginal Tribes Enactment of 1939.

4. Plus some charcoal burning by the Orang Seletar at Johore.

5. cf. Baharon Azhar (1967).

6. This is a long standing similarity. cf. Leech (1880) who describes Malay influence in Kinta.

7. cf. *Carolis de Silva* v. *Tin Kim* (1904) 9 S.S.L.R. 8, *Chua Mui Nee* v. *Palaniappan* [1967] 1 M.L.J. 270 and the cases there cited.

8. The provisions of the new Law Reform (Marriage & Divorce) Bill 1972 do not apply to the Orang Asli as such but the case of inter-racial marriage is likely to prove more difficult.

9. cf. Benjamin, 1966: 18.

10. These are issued by the Jabatan Orang Asli and have given rise to the notion, previously foreign to the Senoi, of ownership of an *area*. It is firmly believed, at least among the Semai of southern Perak, that these maps constitute an admission by government that the land indicated in the map is 'Semai land' as distinct from neighbouring Malay and Chinese owned land.

11. cf. Dentan, 1968: 67–8.

12. cf. Benjamin (1967) on the Temiar.

13. See the discussion in Dentan, 1968: 55ff on *punan* and the difficulties this concept is likely to raise in the court.

14. See Chapter 1.

15. No. 11/1950 and amendments.

16. Evidence Ordinance 1950, s.49.

17. cf. *Sim Ah Song* v. *R.* [1951] M.L.J. 150 where Brown Ag. C.J. said: '... unless the witness of opinion gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position to determine the question which it is its duty to determine, and if the court acts on a bare expression of the experts' opinion the determination becomes that of the expert and not of the court.' See also *Ang Chwee Keong* v. *R.* [1955] M.L.J. 36.

18. cf. Phipson, 1970: para. 972.

19. For a judicial discussion of evidence and aboriginal claims see the Australian case *Milirrpum* v. *Nabalco Pty. Ltd. & the Commonwealth of Australia* [1971] 17 F.L.R. 141 at 152–65.

8

PERSONAL LAWS AND THE NATION STATE

Introduction

THE history of the law in Malaysia is a history of legal pluralism; the development of Malaysian common law involved not merely the adaptation of English law but an exercise in value judgment by the judiciary. The famous phrase in the first Charter of Justice of 1807 directing the administration of justice on the basis of English law was clearly to this effect:

> [To administer justice] .... As nearly as the Condition and Circumstances of the Place and Persons will admit of... due Attention being had to the several Religions, Manners, and Usages of the Native Inhabitants.

This is not properly a direction to the *Court* but an invitation to the individual *Judge* to give decisions suitable to the circumstances, of the settlement. The most characteristic feature of the settlement, and of later British possessions in the Malayan peninsula, was the diversity of races, languages and modes of life of the inhabitants. It was therefore necessary that the judicial process should show a correspondence to these facts; in effect this meant that the principles of the common law received a new value orientation. Not only were the cases and (to some extent) the statutes concerned directly with what was good or just or desirable but the methods of procedure were predicated upon these premises. The personal laws were the consequence of this general ethical concern by means of which the principles of English law were circumscribed by the realities of local conditions. The development of the personal laws was not consistent nor perfectly logical — no part of the common law is — but it was an attempt by the politically superior English law to reach some accommodation with indigenous cultures.

The Personal Laws

It is perhaps apposite to sketch here, in brief, what seem to be the major features in the development and present status of the personal laws. This sketch has no pretence to completeness.

LANGUAGE

The first issue which arises is the question of language. The language of the law is English and, moreover, it is a confined and special sort of English — the language of lawyers. It consists of a vocabulary of terms used by the specialist but not generally understood by the non-specialist and is made up of two sorts of terms: first those which are in non-specialist use but which are used in positive law either as shorthand terms for complex structures (e.g. 'trust') or as terms with peculiar and defined meanings in some technical part of the law (e.g. 'negligence' in the law of tort). Second, there is a vocabulary of technical terms which pertain to concepts and institutions which do not exist outside the law. Examples include phrases such as 'reasonable man' and terms such as 'endorsement', 'precedent' and so on. The peculiar language of the law as it exists in cases, statutes and so on, is usually justified as essential in legal communication both as a requirement of certainty and for ease of legal transaction. It is also seen as a necessity in providing a standard form or set of categories under which fact situations can be more or less automatically subsumed. In other words, the demands of the special terminology on a set of facts acts as a first instance classifier, most obviously in dividing facts into relevant and non-relevant.

Allied to the special vocabulary is a style of usage in language which is characterized by an emphasis upon precision and by the repetition of words or phrases. The use of such a style is partially a result of the use of a vocabulary but it is often criticized as an exercise in obfuscation. Bentham, for example, spoke of 'nomenclature divised in a barbarous age, by a mixture of stupidity, ignorance, error, and lawyer-craft'.[1] However this may be, one commentator[2] has recently distinguished three functions which a style of usage may be said to perform. First, to mark off the professional as a special group from the non-professional, and to inculcate special and confined methods of thought. Second, and following from this, to provide a standardized method of communication for professional use. The third possible function which has been isolated by some commentators is a ritual one by which certain

attitudes — fear, awe — are realized. This of course may be looked at either from a sociological or legal perspective and although it can never be precisely measured, it can be demonstrated to exist in a variety of forms and systems.

Perhaps these general statements can be illustrated by an example drawn from Malay adat law. In that system of law known as adat perpateh it is a principle that ownership of land is confined to female members of named clans. Any transfer or charge over such land is subject to options being given to other female members and in no event is it possible to transfer this land into male ownership. These restrictions have given rise to a common supposition that female clan members hold land '*in trust for* the tribe'. The definition of trust is by no means clear and confined even in English law[3] but a generally accepted definition would be that a trust is an equitable obligation binding a trustee to deal with property over which he has control (the trust property) for the benefit of persons (beneficiaries) of whom he may himself be one, and anyone of whom may enforce the obligation. In the sense just outlined the term 'trust' is clearly inapplicable to the adat rule that only females may be owners of land. The female owners are not trustees in any sense near the English use of this term; if the woman is the registered owner of land under the appropriate statute she has an indefeasible title. Further, and more important from the personal law situation, adat knows no distinction between law and equity, a distinction which is at the root of the institution of the trust. This is an example of the inappropriateness of the technical vocabulary of English law to the facts of a foreign legal system.

A second point, specifically on the special style of usage, can also be illustrated from Malay adat. The most specialized and standardized usage of style in English law is to be found in statute. So far as the Malay adat is concerned, its rules have been in the form of statutory provisions since 1910. The process of reducing what appeared to be inchoate rules into the language of statute was highly selective; the most fundamental principle was that land found to be adat land would be protected as to ownership and distribution by endorsement of the title. The problem, however, was that in addition to this land there was also land, the title to which had not been endorsed, which was also governed by adat rules of which the statute took no cognizance. This resulted in an awkward situation including the development of conflicting precedents.[4] The effect on the Malay peasant was equally severe and resulted in a loss of confidence in the imposed legal system. In an attempt

to come to grips with what was seen as an alien and incomprehensible set of rules, the peasants attempted to develop a style of special usage (in Malay) with which to present their claims under adat to the authorities. One striking example of this was the development of the term '*di-registerkan*'. This is the English word 'register' with a Malay prefix and suffix. It is used in a variety of meanings at village level (as distinct from the official level) to mean generally a process of validation. Such a process could be based upon adat rules or upon agreement in a particular circumstance including the application of what were thought to be rules, both procedural and substantive, of the imposed system. The style of usage was felt to validate 'of itself' any particular decision reached or course of action decided upon.

The use of language, whether 'ordinary', 'correct', or otherwise, is regarded by the law as being susceptible to confinement and specialization within the orbit of the court. This poses several difficulties in the field of personal laws. First, on the general question of the relation of languages and concepts of law; the formulation of concepts for whatever purpose is based upon features of language which may or may not be universal. It assumes the possibility of an adequate characterization of the uses of language, a position which is denied by some authorities. The particular concepts which flow from these views of language are limited to those linguistic usages upon which they are based and do not necessarily extend to data from outside that system. Therefore, any cross cultural application is not possible except if it be shown that the foreign data supports this particular view of language use.

Second, because plural law appears in the form of positive law it would therefore seem that the analyses used in the original municipal systems could be applied *mutatis mutandis* to this situation.[5] The objection to this, however, is that in many cases the mixing of concepts from a number of obligation systems discloses a usage in which it is not possible to make any of the assumptions outlined above in respect of usage.

Finally, the language theory of English law assumes that, as a matter of fact, the usage established by the court can and will be translated into action in the application and enforcement of any judgment. This is a reasonable assumption in Anglo-American jurisprudence, not just because of the efficiency of legal machinery but also because on the question of use the pronouncements of the court are more or less cognizable to the individual concerned. Neither of these features is necessarily present in the Malaysian

personal law situation; in particular the mode of procedure is often based on concepts which are wholly alien to the bulk of the recipient population. This also results in considerable difficulty in ascertaining usage in a specific instance, extending also to the non-possibility of ascribing a particular (legal) consequence to any usage.

The implications of this description and also of the foregoing examination of lawyer's language may be summarized as follows:

(i) There is a clear distinction between lawyer's usage and the concepts of law necessary in the analysis of particular topics in law or systems of positive law.

(ii) So far as the *practice* of positive law is concerned reference to the rules of the particular system involved is sufficient. For example, the practice of Islamic law in, say, Malaysia is a practice carried out in terms of statute, judicial decision and so on, and not in terms of defining the characteristics of 'law'.

(iii) For an adequate description of *how* a personal law works at all levels a reliance upon the concepts of some particular positive system is not sufficient. This is simply because, in the question of usage, the particular system does not of itself admit the relevances of usages outside its own boundaries.

(iv) Finally, and as a result of these points, it is necessary to develop a method of adequately representing the reality of two laws in interaction. This is primarily a question of language — of ascertaining upon what basis the verbal symbols of various interacting systems are built up. At a superficial level this is merely a question of translating words and phrases from one language to another. But as any comparative lawyer will know, and as the example of Malay usage given earlier illustrates, grasping a foreign reality, and this is what is implicit in personal law, is much more complex. The reason for this is not difficult to see; language is not just a medium for the transmission of ideas but is an important factor in the formation of ideas. Our concept of what the world is is related to the language in which we express our experience because this experience is organized and interpreted in terms of our language structure. This was early stated by Edward Sapir who said:[6]

> Language is a guide to 'social reality'. Though language is not ordinarily thought of as of essential interest to the students of social science, it powerfully conditions all our thinking about social problems and processes. Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society. It is quite an illusion to imagine that one

adjusts to reality essentially without the use of language and that language is merely an incidental means of solving specific problems of communication or reflection. The fact of the matter is that the 'real world' is to a large extent unconsciously built up on the language habits of the group. No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached.

Although not all jurists accept this statement without qualification, a close inter-relationship between language and culture is accepted. The importance of this is particularly marked in studies of comparative law and in the personal law situation.

Cultural Facts

In this section we shall be concerned with the facts that the data of personal laws represents or comes from a variety of cultures and epistemologies. Examples include the Hindu, Islamic and Chinese traditions to name only the most obvious. The cultural facts of such traditions are accommodated within the forms of the various personal laws but only upon the terms and conditions of the national legal system. It is a fact long known and familiar to students of plural laws that this accommodation exists upon two levels. The first is the official level, which is exemplified in such forms as statute and judicial decision; in this form the accommodation is said to 'exist as a fact'. However, at the second level, the 'level of reality', it has been demonstrated all too often that the official accommodation 'does not work'. Commonly it has no or little effect in the real world outside the courts or the legislature. To a large extent this is a consequence of the law not being able to subsume the 'facts' of Malaysian cultures into its own schemes of classification. The facts of these cultures were and are generally limited by the (legal) rules of relevance to what was and is acceptable to the dominant system. This did not extend to admitting a total fact complex, to sorting out anything like man's relationship with the objective world, his 'being-in-the-world'. Only *some* facts of nature and *some* facts of morality or culture were and are permitted to determine the ontological grounds for dealings between individuals. We can exemplify this by returning briefly to the description of the relationship between English law and Hindu law.[7] In this relationship an attempt was made by officials of the dominant system to ascertain the content of Hindu law; it was, however, consistently assumed that this content *could* be stated and applied without

distortion within an English legal process. This assumption made inevitable a selective application which was to varying degrees a distorted version of the content of Hindu law. The distortion was a result of selective application but in addition the actual rules selected had become divorced from their original context in the total body of Hinduism. Particular and specified rules were retained whilst the original world of which these were a part was ignored. The retention and development of such rules therefore took place in a vacuum which was rapidly filled with English law concepts, most notably the 'justice, equity and good conscience' principle. That is to say, by a principle whose sole and necessary function is to relate the rule (of law) to the world of fact. We have, therefore, a situation in which an isolated rule from one system lives in the ambit of another and foreign system; the nearest analogy is probably where a foreign body is present in one's own body. This naturally causes an irritation, a feature also of the development of the personal laws.

The Reality of Personal Laws

The system of personal laws is a system of diverse *sources* of law, and the only way to determine which are the relevant sources or proper sources or even institutional sources is a resort to the law-applying organ, *viz:* the court. It is in the court that these questions are answered and it is here that fact and law meet. If we admit that law guides behaviour by stipulating consequences, then it is clear that the law-applying organ must be a focus because this is the institution which ultimately enforces such consequences. We should not forget that laws, from whatever sources, are normative and guide the actions of the courts as much as they guide the actions of ordinary people. Their existence is therefore based in social practice and this is common to all positive norms.

These comments now raise the question of identifying the law-applying organ. In our own societies we are accustomed to a variety of such organs — the courts, tribunals of various sorts, and so on. These bodies, however, all have one thing in common and this is that they are part of an institutionalized hierarchy. However, in the personal law situation it is not uncommon to find other forms or modes which, although outside the ambit of the courts are yet part of the cultural *milieu* in which such laws exist. We can illustrate this with the example of the Malaysian 'petition writer'. At its simplest, the Malaysian petition writer provides a fundamental service in filling in the many forms required by those (illiterate) persons who have dealings with the various departments of the

bureaucracy. The only qualifications required are a knowledge of English and Malay. In the towns and urban centres of Malaysia the petition writers undertaking this type of work very often develop a considerable expertise in the regulations and procedures of whatever part of the bureaucracy it is with which they happen to be concerned. Equally important, however, are the 'contacts' which they develop with individual civil servants within government and through whom, for a consideration, any particular matter can be 'expedited'. The government departments which attract the services of petition writers in large numbers are those which deal with the registration of citizenship and residence, and with transport licensing. The former demands a specialized knowledge of complex regulation and the latter requires effective 'contacts'. The function of the petition writer in the urban areas then is that of acting as a middleman between the bureaucracy and the urban illiterate in consideration of a fee.

The mention of payment introduces the question of the government regulation of the activities of the petition writer. Government regulation is characterized by its paucity and simplicity and this in itself is a fair indication of the official view as to the function of the petition writer, *viz.* as a middleman between the illiterate citizen and the government apparatus. A typical example is the Selangor Petition Writers Enactment of 1957.[8] The outstanding features of the legislation, apart from its brevity, are as follows.

(a) 'Petition Writer' is one who (not being an Advocate or Solicitor) prepares documents for other persons for reward or a fee.

(b) A petition writer must be registered as such and those who act without registration are subject to fine.

(c) The registration is carried out at the District Office of the district in which the petition writer resides. The District Officer may refuse to register any applicant who is 'not possessed of proper qualifications for writing petitions.'[9]

The nature of 'proper qualifications' is nowhere specified in the act so that registration is very much a local matter and at the discretion of the District Officer. This is an extremely important point particularly in the rural areas of Malaysia where the function of the petition writer far exceeds that of the urban petition writer both in scope and in importance. The reason for this is primarily that the District Office is the taxation and land office for an administrative district and an important part of its day to day work consists in registering changes of ownership and interests in land. Such

changes come about through sale or inheritance and in the first instance the District Officer or an Assistant District Officer exercises a judicial function in the disputes which commonly arise. In one state in Malaysia, Negri Sembilan, there exists a system of land law called adat perpateh the rules of which are, in some topics, contrary to the rules of Islamic law which ideally should bind the Malay peasant proprietor as a Muslim. It is in the context of these two systems of law that land disputes usually occur and the petition writer becomes involved at a very early stage. This takes place when one of the parties to any land transaction engages the petition writer to complete the forms necessary to engage the machinery of the land office. It is at this point when claims begin to be reduced to writing, that disputes over land, especially concerning inheritance, begin to come to a head.

Amongst the better known and more prominent Malay petition writers in this state it is not uncommon to find men who combine in themselves a unique competence in respect of the sorts of disputes just outlined. For example, some known to the writer combine a knowledge of adat and Islamic law with a past experience as serving officers in the land office itself. Not only do they have contacts in the land office but they also possess a detailed knowledge of the land office procedures and of the law and regulations. This latter extends, in one case known to the writer, to an ability to repeat *verbatim* large portions of the regulations, combined with a knowledge of how to manipulate the regulations towards a desired end. The result is that in any dispute presented to him in his capacity as petition writer, the individual qualified in the way just described is able to assess the validity of any claim and to interpret the law and advise upon its consequences. This does in fact occur in a distinguishable number of cases and it obviously represents an advance upon the formal function of the petition writer as this is conceived in, for example, statute.

A further and logical consequence of this state of affairs is the intervention of the petition writer into disputes on the basis just described. This takes the form of a mediation of competing claims before the officials of government and religion become involved. The actual process takes place in an informal atmosphere and in coming to an agreed decision the strict rules of law, whether of adat or Islam, are not applied as such but used as a basis for bargaining. The compromise solutions achieved in this way are by no means binding in the sense that a dissatisfied party can always proceed to the District Office for an official adjudication.

This is but one example but it illustrates an attempt to come to grips with the national legal system without participating in the formal process as such.

Personal Law and Social Change

This is a topic on which much work remains to be done. All that will be offered here is a brief indication of the position of the personal laws. In setting out to effect social change through law it is true to say that the organs of the politically dominant system have, without exception, emphasized the prescriptive role of law. Its task is seen as that of defining and securing a certain social order, i.e. of creating social conditions, patterns of behaviour and modes of organization felt to be suitable. The development of the personal laws has been a part of this activity which can, without too much distortion, be called creative. The major effort, however, in all cases has been the creation of a legal apparatus to carry out these tasks. This has comprised the identification of one source of authority and the establishment of institutions under that authority. Positive law is seen as a tool to accomplish a desired purpose in the same way that the prescriptive role of law accomplishes desired purposes in our own societies. The fact that this prescriptive function of law is seen as strictly analogous is of particular importance here. In the municipal states of the West there is a close co-ordination between law acting in its prescriptive role and the actual order within which it functions. The legal order, substantively and procedurally, reflects the circumstances that gave rise to it; but in fact the prescriptive role of law, although important, is only one amongst a number of other factors which operate the legal order. In most cases, legal prescription is already the subject of a normative acceptance amongst the population at large so that law is both the creator and servant of social facts and values. But if the prescriptive role of law is insisted upon and emphasized for purposes of social change its function is to redefine and re-structure social fact and social values. In other words, it must change social fact by destroying the close and harmonious co-ordination between prescription and the actual social order. In this situation the only source of its ontology now lies in the exertion of prescription through the legal apparatus. The effectiveness of law is thus severely limited for it is not possible merely by putting out a prescription effectively to change a social order. It may of course be possible to amend parts of it but in extreme cases the result of a too heavy reliance upon law in its prescriptive role alone will be either the rejection of a programme

of social reform or the dismissal of the legal apparatus as a whole by the population. Both of these reactions are endemic in the personal law situation. From the viewpoint of the national legal system, however, such rejection is 'illegal' because the prescriptions involved 'are valid law'. On the other hand, the outside observer clearly sees that the changes prescriptively ordered 'are not valid', that is, are not found to occur in practice: the particular propositions of law do not have a descriptive validity.

These four characteristics may each be said, in their own way, to distinguish or mark off the personal laws from the generality of the laws comprising the national legal system. They form a part, but a distinct part, of this system and it is here that wider national issues of language, culture and value are authoritatively determined. Such a determination involves judicial policy and the politics of law in its widest sense, most notably in the reform of and/or modernization of law.

Personal Laws and National Law

The trend of the foregoing sections tends to the view that law may usefully be considered not as an ultimate value in itself but as a means of realizing other values, including a variety of social and political goals. The law may be regarded as a medium or instrument of social and political worth which need not necessarily have an intrinsic value. It should be obvious that this view clearly distinguishes the instrumental value of law on the one hand, from the goals that law is used to serve on the other. This is not always as easy to accomplish in practice as it is to put on paper because the law's value as a medium is often transposed to become an ultimate value. Very often this is a consequence of the conviction and/or experience that it is better to have some law rather than no law at all.

The proper utilization of law as an instrument depends primarily upon two factors. First, as said earlier in this chapter, the prescriptive and descriptive roles of law must correspond to a satisfactory degree. That is to say, the methods of thought and conceptions of reality of the indigenous populations must be adequately represented in the principles and procedures of the national system. The bodies of 'native law and custom' in the colonial system represented this factor even though in many cases distortion did arise. This distortion was partially the result of the autonomous character of law; in the Malaysian case the wholesale importation of English procedure which required that the parties to any action presented their case in the forms laid down. The mere fact that the procedure

was accusative in nature was of itself a revolutionary change so far as the Chinese, Hindu, Islamic, and adat systems were concerned. There was a change from mediation and compromise to an all or nothing accusative position. Equally important was the English law stress upon the individual as the primary point of reference in any case. English law was not prepared to countenance the idea that a group, whether of family or religion, was a claimant or defendant. Indeed, in cases involving more than one person, the court commonly raised questions of joint or separate liability, classifications which had no possible bearing upon the issue so far as the parties were concerned. These and similar considerations raise one important point for the courts: this is that although a court may hand down a decision, the decision itself may be subject to alteration or change outside the court. Parties are of course free to do this by way of later agreement but the fact that this does occur in the personal law field should give the court pause for care. This is a topic on which contemporary research could usefully be concentrated.

The second major factor in the proper utilization of law is that it must fit in with the complex of external conditions whether economic, technical, ecological and so on, within which its subjects find their existence. The initial problem is to establish what the goals of social and political development are to be and this is a matter of (value) choice which must be exercised by the governments concerned. It seems now fairly well established that the more or less universal goal is 'development' by which is meant the attainment of some degree of economic sufficiency and of a condition of social egalitarianism. The precise nature of these varies from one society to another and within the same society over a period of time. Having established as exactly as possible what it is that these terms mean, the second problem is to decide how the law is to be properly utilized in this aim. The alternatives are (a) the continuation of the plural systems or (b) the abolition of the plural system in favour of some model, either Western or Socialist, of a unified law. The actual choices made in the contemporary world vary from state to state and, in some cases, include a compromise between the two major alternatives. However, it is clear from the descriptions of Malaysian personal laws that complete change has not been demanded. On the contrary, the national legal system has applied or allowed selected parts of the personal systems to continue. The effect of this selective application has been to introduce a curious artificiality and rigidity to some areas of obligation particularly

into family and property matters. But on the other hand selective application cannot be said to have impeded development at least during the colonial period. At the present time, however, this may no longer be correct; it is felt that, in so far as the goal is the creation of a national unity, the scope of the personal laws must be further limited. The proposed reform of the marriage and divorce laws is an indication of this trend.[10]

1. Cited in Mellinkoff, 1963: 265.
2. cf. Friedman, 1964: 566–72.
3. cf. *Re Marshall's Will Trusts* [1945] Ch. 217 at 219, *Re Williams* [1897] 2 Ch. 2 at 19.
4. See Hooker, 1972: 55–68.
5. See Chapter 1 on the difficulties of applying conflicts of laws principles to Malaysian personal laws.
6. Cited in J. C. Smith, 1968: 194.
7. cf. Chapter 6.
8. Enactment No. 2/1957. Other state enactments which are substantially similar in terms include the following: Kedah Petition Writers Enactment No. 75/1934, Johor Petition Writers Enactment No. 16/1938, Perlis Petition Writers Enactment No. 15/1354 and the Kelantan Petition Writers Enactment No. 23/1939.
9. Section 4 of the Selangor Petition Writers Enactment No. 2/1957.
10. See Appendix.

APPENDIX

LAW REFORM (MARRIAGE AND DIVORCE) BILL, 1972

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SCHEDULE

An Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto.

BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows:

PART I

PRELIMINARIES

Short title and commencement.

1. This Act may be cited as the Law Reform (Marriage and Divorce) Act, 1972, and shall come into force on such date as the Yang di-Pertuan Agong may, by notification in the *Gazette*, appoint.

Definitions.

2. In this Act unless the context otherwise requires—

(*a*) "child of the marriage" means a child of both parties to the marriage in question or a child of one party to the marriage who has been accepted as one of the family by the other party and "child" in this context includes an illegitimate child of and a child adopted by either of the parties to the marriage in pursuance of an adoption order made under the Adoption Ordinance, 1952; No. 41 of 1952

(*b*) "court" means the High Court or a judge thereof;

(*c*) "marriage district" means an area which has been defined as a marriage district under section 26 (5) of this Act and if no such area has been so defined in any State means that State;

(*d*) "marriage with another woman" means marriage of any person, being married, to any other person during the life of the former wife, whether the second marriage has taken place within Malaysia or elsewhere;

(*e*) "Minister" means the Minister charged with responsibility for the registration of marriages;

(*f*) "minor" means a person who is under the age of twenty-one years and who is not a widow or widower;

(*g*) "Registrar" means a Registrar of Marriages appointed under this Act and includes a Deputy Registrar when so acting and also any person licensed by the Minister to act as Assistant Registrar;

(*h*) "Registrar General" means the Registrar General of Marriages appointed under this Act;

(*i*) "State Authority" means the Chief Minister of the State.

Application

3. (1) Save as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia who are resident outside Malaysia except Muslims.

(2) This Act shall not apply to any person who is married under Muslim law:

Provided that any person, being originally a non-Muslim, to whom the provisions of sections 5, 6, 7 and 8 of this Act apply, shall continue, notwithstanding the conversion of such person to Islam, to be subject to all the provisions of this Act.

(3) This Act shall not apply to any native of the Borneo States or aborigine of the Malay Peninsula.

(4) For the purposes of this Act, a person who is a citizen of the Federation of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

Subsisting valid marriages deemed to be registered under this Act and dissoluble only under this Act.

4. (1) Nothing in this Act shall affect the validity of any marriage solemnised under any law, religion, custom or usage prior to the date of the coming into operation of this Act.

(2) Such marriage, if valid under the law, religion, custom or usage under which it was solemnised, shall be deemed to be registered under the provisions of this Act.

(3) Every such marriage, unless void under the law, religion, custom or usage under which it was solemnised, shall continue until dissolved—

(*a*) by the death of one of the parties;

(*b*) by order of a court of competent jurisdiction; or

(*c*) by a declaration of nullity made by a court of competent jurisdiction.

PART II

MONOGAMOUS MARRIAGES

Disability to contract marriages otherwise than under this Act.

5. (1) Every person who on the date of the coming into operation of this Act is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law,

religion, custom or usage with any person other than such spouse or spouses.

(2) Every person who on the date of the coming into operation of this Act is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all such spouses, shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

(3) Every person who on the date of the coming into operation of this Act is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

(4) After the date of coming into operation of this Act, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III of this Act.

Avoidance of marriage by subsisting prior marriage.

6. (1) Every marriage contracted in contravention of the provisions of section 5 of this Act shall be void.

(2) If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage, contract another union with any woman, such woman shall have no right of succession or inheritance on the death intestate of such male person.

(3) Nothing in this section shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law.

Offence.

7. Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of the provisions of section 5 of this Act shall be deemed to commit the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code.

F.M.S. Cap. 45.

Continuance of marriage

8. Every marriage solemnised in Malaysia after the coming into operation of this Act other than a marriage which is void under the provisions of this Act shall continue until dissolved—

(*a*) by the death of one of the parties; or

(*b*) by order of a court of competent jurisdiction; or

(*c*) by a declaration made by a court of competent jurisdiction that the marriage is null and void.

PART III — MARRIAGE

RESTRICTIONS ON MARRIAGE

Persons by whom marriages may be solemnised.

9. A marriage under this Act may be solemnised only by a Registrar or by any other person granted a licence to solemnise marriages.

Avoidance of marriages where either party is under minimum age for marriage.

10. Any marriage purported to be solemnised in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years unless, for a female who has completed her sixteenth year, the solemnisation of such marriage was authorised by a licence granted by the State Authority under the provisions of section 20 (2) of this Act.

Prohibited relationships.

11. (1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be.

(2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse.

(3) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild.

(4) No person shall marry a person whom he or she has adopted or by whom he or she was adopted.

(5) For the purposes of this section, relationship of the half blood is as much an impediment as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate.

(6) The State Authority may in his discretion, notwithstanding the provisions of this section, grant a licence under this section for a marriage to be solemnised if he is satisfied that such marriage is unobjectionable under the law, religion, custom or usage applicable to the parties thereto and, where such marriage is solemnised under such licence, such marriage shall notwithstanding the provisions of this section be deemed to be valid.

Requirement of consent.

Act 21

12. (1) A person who has not completed his or her twenty-first year shall, notwithstanding that he or she shall have attained the age of majority as prescribed by the Age of Majority Act 1971, nevertheless be required, before marrying, to obtain the consent—

(*a*) of his or her father; or

(*b*) if his or her father is dead, of his or her mother; or

(*c*) if both his or her father and mother died before he or she attains the age of twenty-one years, of the person standing in *loco parentis* to him or her before he or she attains that age,

but in any other case, or if all those persons are dead, shall not require consent.

(2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent was required by sub-section (1).

(3) An application to the High Court under this section shall be made to a Judge in chambers.

(4) When an application is made to the High Court in consequence of a refusal to give consent notice of the application shall be served upon the person who refused to give consent.

(5) Notwithstanding anything to the contrary in this Part of this Act consent to the marriage of a minor shall not be necessary if the minor has been previously married.

(6) There shall be no appeal from an order of a Judge under this section.

PRELIMINARIES TO MARRIAGE

Notice of marriage.

13. Whenever any persons desire to marry in Malaysia each of the parties to the intended marriage shall sign and give a notice in the prescribed form to the Registrar of the marriage district in which such party has been resident for the period of seven days immediately preceding the giving of such notice:

Provided that when both the parties have been resident for such period in the same marriage district only one such notice need be given and may be given by either party.

Notice to be entered in marriage notice book and published.

14. Upon receipt of such notice such Registrar shall cause the same to be entered in a book to be called the Marriage Notice Book, which may be inspected under such supervision as the Registrar may deem necessary, during office hours without fee, and the Registrar shall also cause such notice to be published by posting a copy thereof in a conspicuous place in his office visible to the outside public and shall keep the same so posted up until he grants his certificate as hereinafter mentioned or until three months have elapsed, whichever is the earlier.

Declaration to accompany notice.

15. (1) Every notice required to be given under the provisions of section 13 of this Act shall be accompanied by a written declaration:

(*a*) that one or both of the parties to the intended marriage has been resident in the marriage district for the period of seven days immediately preceding the giving of such notice; and

(*b*) either —

(i) that each of the parties is twenty-one years of age or over, or, if not, is a widower or widow, as the case may be; or

(ii) if either party is a minor who has not been previously married and the female party not under the age of sixteen years, that the consent of the appropriate person mentioned in section 12 has been given in writing, or has been dispensed with, or has been given by a court in accordance with the provisions of section 12 of this Act; and

(*c*) that there is no lawful impediment to the marriage; and

(*d*) that neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted.

(2) Every such declaration shall be in writing in the prescribed form and shall be made by the person giving such notice in the presence of the Registrar who shall attest the same; if such person does not understand Bahasa Malaysia, the Registrar shall ascertain whether such person is cognisant of the purport of the declaration and, if not, shall translate or cause to be translated in his presence the declaration to such person into the language which he understands and shall certify on the declaration that such translation has been duly made or is not required as the case may be.

Issue of certificate for marriage.

16. The Registrar, on being satisfied that the declaration complied with the requirements stated in section 15, shall at any time after the expiration of twenty-one days from the date of publication of the notice under section 14 and upon payment to him of the prescribed fee, issue his certificate for marriage in the prescribed form.

Marriage to take place within six months.

17. Subject to the provisions of section 19 of this Act, if the marriage does not take place within six months after the date of publication of the notice, the notice and all proceedings consequent thereon shall be void and fresh notice shall be given before the parties can lawfully marry.

Caveat.

18. (1) Any person, on payment of the prescribed fee, may enter a caveat with the Registrar against the issue of a certificate for the marriage of any person named in the caveat and notice of whose intended marriage has been given to the Registrar.

(2) A caveat entered under this section shall contain the name and place of residence of the person entering the caveat and the grounds of objection upon which the caveat is founded and shall be signed by the person entering the caveat.

Proceedings if caveat entered.

19. (1) If a caveat is entered in accordance with the provisions of section 18 of this Act the Registrar shall not issue a certificate for the marriage against which the caveat has been entered unless —

(*a*) after examining into the matter of the said objection, he is satisfied that it ought not to prevent the issue of such certificate for the marriage; or

(*b*) the caveat is withdrawn by the person who entered it:

Provided that in cases of doubt it shall be lawful for the Registrar to refer the matter of any such caveat to the High Court which shall decide upon the same.

(2) Where the Registrar has refused to issue the certificate for marriage the person applying for the same shall have a right of appeal to the High Court which shall thereupon either confirm the refusal or direct the grant of the certificate for marriage.

(3) The High Court may inquire into the allegations contained in the caveat in a summary way and may hear evidence in support of and in opposition to the objection.

(4) The proceedings under this section shall be before a Judge in chambers.

(5) There shall be no appeal from a decision of a Judge under this section.

(6) If a caveat is entered in accordance with the provisions of section 18 of this Act, then, notwithstanding the provisions of section 17, no fresh notice need be given and the parties may lawfully marry within three months from the date on which the Registrar issues the certificate for marriage.

(7) If the High Court declares the grounds of objection to be frivolous and such as ought not to prevent the issue of the certificate for marriage the person entering the caveat shall be liable for the costs of all proceedings relating thereto and for damages to be recovered by suit or action by the party against whose marriage such caveat was entered.

Licence.

20. (1) The State Authority, upon proof being made to him by statutory declaration that there is no lawful impediment to the proposed marriage, and upon his being satisfied that the necessary consent, if any, to such marriage has been obtained, or that the consent has been dispensed with or given under section 12 of this Act may, if he shall think fit, dispense with the giving of notice, and with the issue of a certificate for marriage, and may grant his licence in the prescribed form, authorising the solemnisation of a marriage between the parties named in such licence.

Special dispensation as to age of female.

(2) The State Authority may in his discretion grant a licence under this section authorising the solemnisation of a marriage although the female party to the marriage is under the age of eighteen years, but in no case before her completion of sixteen years.

(3) The State Authority on being satisfied, by statutory declaration or otherwise as to him seems proper, that it is more convenient—

(*a*) that a marriage be solemnised in some place in the State other than in the office of a Registrar; or

(*b*) that a marriage be solemnised between the hours of seven in the evening and six in the morning of the following day,

may issue a licence in the prescribed form for one or both of such purposes.

(4) A licence authorising a marriage to be solemnised in a place other than the office of a Registrar shall specify the place in which such marriage may be solemnised.

Period of validity of licence.

(5) If the marriage authorised by a licence under this section is not solemnised within one month from the date of the licence the licence shall become void.

SOLEMNISATION OF MARRIAGES

Solemnisation of marriages.

21. (1) Every marriage under this Act shall be solemnised in the office of a Registrar with open doors within the hours of six in the morning and seven in the evening:

Provided that a marriage may be solemnised at such other place or time as may be specified in the licence issued under sub-section (3) of section 20 of this Act.

(2) A valid marriage may be solemnised by any Registrar if a certificate for the marriage issued by the Registrar or Registrars concerned or a licence authorising the marriage is delivered to him.

(3) Every marriage purported to be solemnised in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or State Authority as the case may be.

(4) Every marriage shall be solemnised in the presence of at least two credible witnesses besides the Registrar.

(5) No marriage shall be solemnised unless the Registrar is satisfied that both the parties to the marriage freely consent to the marriage.

(6) The Registrar, after delivery to him of the certificate or licence, shall, either directly or through an interpreter, address the parties thus:

"Do I understand that you A. B. and you C. D. are here of your own free will for the purpose of becoming man and wife?".

Upon their answering in the affirmative he shall proceed thus:

"Take notice then that, by this solemnisation of your marriage before these witnesses here present according to law, you consent

to be legally married for life to each other, although no other rite of a civil or religious nature shall take place and that this marriage cannot be dissolved during your lifetime, except by a valid judgement of divorce and if either of you shall, during the lifetime of the other, contract another marriage, howsoever and wheresoever solemnised, while this marriage remains undissolved, you will thereby be committing an offence punishable by law."

Next, each of the parties shall declare as follows or to the like effect:

(*a*) "I do solemnly declare that I know of no lawful impediment why I, A.B., may not be joined in marriage to C.D."

and shall continue to say to the other as follows or to the like effect:

(*b*) "I call upon these persons here present to witness that I, A.B., do take you, C.D., to be my lawful wedded wife (or husband)".

(7) If either of the parties does not understand Bahasa Malaysia, the Registrar shall at the time of solemnisation interpret or cause to be interpreted to each party, in the language which the party understands, the declarations to be made at such marriage in accordance with subsection (6) of this section.

(8) The solemnisation of the marriage shall be complete when the parties thereto have attested the entry in the marriage register as provided hereinafter in paragraph (*a*) of subsection (2) of section 22 of this Act.

Entry in marriage register.

22. (1) Immediately after the parties to a marriage have made their declarations set out in section 21, the Registrar shall enter the prescribed particulars in the marriage register.

(2) Such entry shall be attested by—

(*a*) the parties to the marriage; and

(*b*) two witnesses other than the Registrar present at the solemnisation of the marriage.

(3) Such entry shall then be signed by the Registrar solemnising the marriage.

Religious ceremony.

23. (1) Where any clergyman or minister or priest of any church or temple is appointed by the Minister to act as Assistant Registrar of Marriages for any marriage district, such clergyman or minister or priest may solemnise any marriage, if the parties to the marriage or either of them are members or is a member of such church or temple, in accordance with the religious rites and ceremonies of such church or temple and such marriage, in all respects complying with the requirements of sections 13, 14, 15, 16, 17, 20, 21 and 22 of this Act, shall be deemed a marriage solemnised in the office of a Registrar under the provisions of section 21 of this Act.

(2) Where the clergyman or minister or priest of any church or temple is not authorised to solemnise marriages as provided in subsection (1) of this section and the parties to any marriage solemnised under this Act shall desire to add to such marriage the religious ceremony ordained or used by the church or temple of which such parties or either of them are members or is a member it shall be competent for them to present themselves for that purpose to a clergyman or minister or priest of such church or temple, having given notice to such clergyman or minister or priest of their intention so to do; and such clergyman or minister or priest, upon the production of a certified copy of the certificate of such marriage, may, if he shall see fit, read or celebrate the marriage service of the church or temple to which he belongs:

Provided that nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted and solemnised, nor shall such reading or celebration be entered as a marriage in any register of marriages kept according to the provisions of this Act.

(3) Where a person is under expectation of death and desires to have a religious ceremony of marriage between himself and any person performed it shall be lawful for the clergyman, minister or priest of the church or temple to which he belongs to read or celebrate the marriage service of such church or temple:

Provided that such reading or celebration shall not be deemed to be a solemnisation of marriage for the purposes of this Act nor shall it be entered as a marriage in any register of marriages kept according to the provisions of this Act.

Solemnisation of marriages in Malaysian Embassies etc. abroad.

24. (1) A marriage may be solemnised by the Registrar appointed under subsection (4) of section 26 of this Act at the Malaysian Embassy, High Commission or Consulate in any country which has not notified the Government of Malaysia of its objection to solemnisation of marriages at such Malaysian Embassy, High Commission or Consulate:

Provided that the Registrar shall be satisfied—

(*a*) that one or both the parties to the marriage is a citizen of Malaysia;

(*b*) that each party has the capacity to marry according to the provisions of this Act;

(*c*) that, where either party is not domiciled in Malaysia, the proposed marriage, if solemnised, will be regarded as valid in the country where such party is domiciled; and

(*d*) that notice of the proposed marriage has been given at least twenty-one days and not more than three months previously, which notice has been published both at the office of the Regis-

trar in the Embassy, High Commission or Consulate where the marriage is to be solemnised and at the Registry of the marriage district in Malaysia where each party to the marriage was last ordinarily resident and no caveat or notice of objection has been received.

(2) The procedure for solemnisation and registration of marriages at a Malaysian Embassy, High Commission or Consulate shall be similar in all respects to that which applies to marriages solemnised and registered in Malaysia under this Act as if the Registrar appointed for a foreign country were a Registrar in Malaysia.

PART IV

REGISTRATION OF MARRIAGES

Registration.

25. The marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the coming into operation of this Act shall be registered in accordance with the provisions of this Act.

Appointment of Registrar General, Registrars and Assistant Registrars of Marriages.

26. (1) The Yang di-Pertuan Agong may appoint any public officer to be Registrar General of Marriages for the purposes of this Act who shall have general supervision and control of Registrars and of the registration of marriages under this Act.

(2) The Minister may appoint so many public officers, by name or by office, as may be necessary, to be Registrars of Marriages or Assistant Registrars of Marriages for such marriage district in any State as may be specified in the appointment; in this Act all references to a Registrar shall include an Assistant Registrar and any other person authorised by the Minister to act as Assistant Registrar.

Additional appointments of Assistant Registrars for special bodies.

(3) The Minister may, in addition, appoint by name or office, any person whether public officer or not, to be Assistant Registrar of Marriages in respect of any race, clan, association, church or temple, for such marriage district and for such term as may be specified in the appointment, and every such person so appointed shall be deemed, similarly to every Registrar and other Assistant Registrar, to be a public servant within the meaning of the Penal Code.

F.M.S. Cap. 45.

Appointment of Registrars for foreign countries.

(4) The Minister may, by notification in the *Gazette*, appoint any member of the diplomatic staff of Malaysia in any country, either by name or office, to be Registrar of Marriages for the purposes of this Act in that country.

(5) The Minister may, by notification in the *Gazette*, declare any area in a State to be a marriage district and define the boundaries of each district.

Books and Registers to be kept of all marriages in Malaysia.

27. Every Registrar shall keep a Marriage Register and such books as are prescribed by this Act or rules made thereunder and every marriage solemnised in Malaysia by the Registrar shall immediately after the solemnisation thereof be registered by the Registrar in his marriage register.

Copies of entries to be sent to Registrar General.

28. (1) The Registrar solemnising the marriage shall, as soon as practicable after the end of each month, deliver to the Registrar General, a true copy certified under his hand of every entry made in the marriage register as attested by the parties to the marriage and by the witnesses and as signed by him.

(2) All such copies shall be kept by the Registrar General in such manner as may be prescribed and shall constitute the marriage register of the Registrar General.

Registration of foreign marriage by a person citizen of or domiciled in Malaysia.

29. (1) Where any person who is a citizen of or is domiciled in Malaysia has contracted a marriage abroad, not being a marriage registered under the provisions of section 24 of this Act, such person shall within three months after the date of such marriage appear before the nearest or most conveniently available Registrar of Marriages abroad in order to register such marriage unless before the expiry of such period the return of either or both parties to Malaysia is contemplated, in which case, should the marriage not have been so registered abroad, registration of the marriage contracted abroad shall be affected, within three months of the first arrival of either or both the parties in Malaysia, by such party or both appearing before any Registrar in Malaysia and—

(*a*) producing to such Registrar the certificate of such marriage or such evidence either oral or documentary as may satisfy the Registrar that such marriage took place;

(*b*) furnishing such particulars as may be required by the Registrar for the due registration of such marriage; and

(*c*) applying in the prescribed form for the registration of the marriage to be effected and subscribing the declaration therein.

(2) A Registrar may dispense with the appearance of one of the parties to the marriage if he is satisfied that there exists good and sufficient reason for the absence of such party and in such case the entry in the marriage register shall include a statement of the reason for his or her absence.

(3) Upon the registration of any marriage under the provisions of this section a certified copy of the entry in the register signed by the Registrar shall be delivered or sent to the husband and another copy to the wife and a certified copy of the entry in the register shall be sent, within such period as may be prescribed, to the Registrar General of Marriages who shall cause such certified copies to be bound together to constitute the Foreign Marriages Register.

(4) Where the parties to a marriage required to be registered under this section have not appeared before a Registrar within the three months as prescribed in subsection (1) hereof, the marriage may, upon application to the Registrar, be registered by him on payment of such penalty as may be prescribed.

Unlawful registers.

30. No person other than a Registrar appointed under this Act shall—

(*a*) keep any book being or purporting to be a register kept in accordance with the provisions of this Act; or

(*b*) issue to any person any document being or purporting to be a copy of a certificate of a marriage or a certificate of marriage registered by the Registrar.

Voluntary registration of marriages previously solemnised under religion or custom.

31. (1) Notwithstanding the provisions of section 4 of this Act, the parties to any marriage solemnised under any law, religion, custom or usage prior to the coming into operation of this Act may, if such marriage has not been registered, apply at any time to a Registrar in the prescribed form for the registration of such marriage.

(2) The Registrar may require the parties to such marriage to appear before him and to produce such evidence of the marriage, either oral or documentary, as he may require and to furnish such other particulars as may be required by him.

(3) The Registrar may on being satisfied of the truth of the statements contained in the application register the marriage by entering the particulars thereof in the marriage register prescribed for this purpose.

(4) The entry of such marriage in the marriage register shall be signed by the Registrar making the entry and by both the parties to the marriage, if available, otherwise, by whichever party shall appear before the Registrar for effecting registration of the marriage.

(5) Upon the registration of such marriage a certified copy of the entry in the marriage register signed by the Registrar and sealed with his seal of office shall be delivered or sent to the husband and another copy to the wife and a third certified copy shall be sent to the Registrar General.

(6) The Registrar shall not register a marriage under this section if he is satisfied that the marriage is void under the provisions of this Act.

Legal effect of registration.

32. Nothing in this Act or rules made thereunder shall be construed to render valid or invalid merely by reason of its having been or not having been registered any marriage which otherwise is invalid or valid.

PART V

PENALTIES AND MISCELLANEOUS PROVISIONS RELATING TO THE SOLEMNISATION AND REGISTRATION OF MARRIAGES

Omission to appear before Registrar within prescribed time.

33. Any person who, being required by section 29 of this Act to appear before a Registrar, omits to do so within the prescribed time shall be liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars or to both such imprisonment and fine.

Contravention of section 30.

34. Any person who contravenes the provisions of section 30 of this Act shall be liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; and for a second or subsequent conviction shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding two thousand dollars or to both such imprisonment and fine.

Interference with marriage.

35. Any person who uses any force or threat:—

(*a*) to compel a person to marry against his will; or

(*b*) to prevent a person who has attained the age of twenty-one years from contracting a valid marriage,

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding three thousand dollars or to both such imprisonment and fine.

False oath, etc., for procuring marriage.

36. Any person who for the purpose of procuring any marriage under this Act intentionally makes any false declaration or signs any false notice or certificate required by this Act shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding three thousand dollars or to both such imprisonment and fine.

False allegation in caveat.

37. (1) Any person who enters a caveat against the issue by a Registrar of a certificate for marriage and makes any false representation in or in support of the caveat knowing or believing such representation to be false or not having reason to believe it to be true, shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not

exceeding three years or to a fine not exceeding three thousand dollars or to both such imprisonment and fine.

(2) Any person who enters a caveat against the issue of a certificate for marriage and pretends or falsely represents himself to be a person whose consent to the marriage is required by law knowing or believing such pretence or representation to be false or not believing it to be true shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding three thousand dollars or to both such imprisonment and fine.

Unauthorised solemnisation of marriages.

38. Any person who, not being authorised thereto under this Act, solemnises or purports to solemnise any marriage, shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding ten years and shall also be liable to a fine not exceeding fifteen thousand dollars.

Offences relating to solemnisation of marriages.

39. (1) Any person who knowingly and contrary to this Act solemnises or purports to solemnise or officiates at a marriage—

(*a*) without first receiving a certificate for the marriage or a licence dispensing with such certificate;

(*b*) otherwise than in the presence of at least two credible witnesses other than the person solemnising the marriage; or

(*c*) after the expiration of six months from the date of the notice of marriage given under section 13 of this Act,

shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding three years and shall also be liable to a fine not exceeding five thousand dollars.

(2) Any Registrar who knowingly and contrary to this Act issues any certificate for marriage—

(*a*) without publishing the notice of marriage as required by section 14 of this Act;

(*b*) when a caveat has been entered under section 18 of this Act without having first complied with section 19 of this Act; or

(*c*) contrary to the provisions of section 15 of this Act,

shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding three years and shall also be liable to a fine not exceeding five thousand dollars.

(3) Any person who marries or purports to marry or goes through a form of marriage with any person contrary to any of the provisions of Part III of this Act shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years and shall also be liable to a fine not exceeding five thousand dollars.

Destroying or falsifying register book.

40. Any person who by himself or another—

(*a*) wilfully destroys or injures any register of marriages or any certificate thereout, or any part thereof or any authenticated extract therefrom;

(*b*) falsely makes or counterfeits any part of such register or certificate; or

(*c*) wilfully inserts any false entry in any register or certificate or authenticated extract,

shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding seven years, and shall also be liable to a fine not exceeding ten thousand dollars

Sanction for prosecution.

41. No prosecution for any offence punishable under this Part of this Act shall be instituted except with the authority in writing of the Attorney General or the Solicitor General.

Correction of errors.

42. (1) If the Registrar is satisfied by statutory declaration or otherwise that any entry relating to a marriage is erroneous in form or substance, he may, in the presence of the persons married, or, if they are absent, in the presence of two credible witnesses, correct the error by ruling through any entry in the certificate of marriage which is erroneous and making the correct entry therein and he shall thereupon cause the entry in the local marriage register to be corrected in the same manner.

(2) The Registrar shall sign and date the correction made in the certificate of marriage and the local marriage register.

(3) Every entry made under sub-section (1) of this section shall be attested by the witnesses in whose presence it was made.

(4) A certified copy of such correction shall be sent forthwith to the Registrar General for a similar correction to be made in his Marriage Register.

Inspection and search.

43. (1) Every marriage register and index kept by the Registrar General under the provisions of this Act shall be open to inspection upon payment of the prescribed fee by any person applying to inspect the same.

(2) The Registrar General shall upon payment of the prescribed fee furnish to any person requiring the same a copy of an entry certified under his hand and seal of office.

Proof.

44. Every marriage register kept by the Registrar under the provisions of this Act and any copy of any entry therein certified under his hand and

seal of office to be a true copy or extract shall be *prima facie* evidence in all courts and tribunals in Malaysia of the dates and acts contained or set out in such marriage register, copy or extract.

PART VI

DIVORCE

Principles of law to be applied.

45. Subject to the provisions contained in this Part of this Act, the court shall with all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

Extent of power to grant relief.

46. (1) Nothing herein shall authorise the court to make any decree of divorce except—

(*a*) where the marriage has been registered or deemed to be registered under the provisions of this Act; or

(*b*) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(*c*) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

(2) Nothing herein shall authorise the court to make any decree of judicial separation except—

(*a*) where the marriage has been registered or deemed to be registered under the provisions of this Act; or

(*b*) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(*c*) where both the parties to the marriage reside in Malaysia at the time of the commencement of proceedings.

Additional jurisdiction in proceedings by a wife.

47. (1) Notwithstanding anything to the contrary in section 46 (1) (*c*) of this Act the court shall have jurisdiction to entertain proceedings by a wife under this Part of this Act, although the husband is not domiciled or resident in Malaysia if—

(*a*) the wife has been deserted by the husband, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or

(*b*) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of three years immediately preceding the commencement of the proceedings.

(2) In any proceedings in which the High Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.

(3) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law for the time being in force in Malaysia.

Restriction on petitions within three years of marriage.

48. (1) Subject to the next following subsection, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage (hereafter in this section referred to as "the specified period").

(2) A Judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional circumstances or hardship suffered by the petitioner; but in determining the application the Judge shall have regard to the interests of any child of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties during the specified period.

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which occurred before the expiration of the specified period.

Dissolution by mutual consent.

49. If husband and wife mutually agree that their marriage should be dissolved and if neither of them professes Christianity they may after the expiration of three years from the date of their marriage present a joint petition accordingly and the court may, if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of dissolution as it may deem fit.

Breakdown of marriage to be sole ground for divorce.

50. (1) Either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down.

(2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

Proof of breakdown.

51. (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say—

(*a*) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(*b*) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(*c*) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(*d*) that the parties to the marriage had lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

(2) In considering whether it would be just and reasonable to make a decree the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree *nisi* subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

Provisions designed to encourage reconciliation.

52. (1) Provision may be made by rules of court for requiring that before the presentation of a petition for divorce the petitioner shall have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged.

(2) If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation. The power conferred by the foregoing provision is additional to any other power of the court to adjourn proceedings.

Rules to provide for agreements to be referred to court.

53. Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit.

Contents of Divorce Petition.

54. (1) Every petition for divorce shall contain—

(*a*) particulars of the marriage between the parties and the names, ages and sex of the children, if any, of the marriage;

(*b*) particulars of the facts giving the court jurisdiction;

(*c*) particulars of any previous matrimonial proceedings between the parties;

(*d*) a statement of the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage;

(*e*) where the petitioner has been guilty of any marital misconduct, an admission of same;

(*f*) the terms of any agreement regarding maintenance of the wife or dependent party and the children, if any, of the marriage, or the division of any assets acquired through the joint efforts of the parties, or where no such agreement has been reached, the petitioner's proposals; and

(*g*) particulars of the relief sought.

(2) Every petition for a divorce shall state what steps had been taken to effect a reconciliation.

Damages for adultery may be claimed against co-respondent.

55. (1) On a petition for divorce presented by the husband in which adultery is alleged, or in the answer of a husband praying for divorce and alleging adultery, the husband shall make the alleged adulterer a co-respondent unless excused by the court on special grounds from doing so; a petition by the husband may include a prayer that the co-respondent be condemned in damages for the [sic] in respect of the alleged adultery.

(2) On a petition for divorce presented by the wife in which adultery is alleged the court may, if it thinks fit, direct that the alleged adulteress be made a co-respondent, and the petition may then include a prayer that she be condemned in damages for the said adultery.

(3) Where damages have been claimed against a co-respondent—

(*a*) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or

(*b*) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element.

Powers of court on claim to damages for adultery

56. (1) The court may award damages against a co-respondent notwithstanding that the petition is against the respondent, dismissed or adjourned.

(2) The court shall have power, when awarding damages, to direct that such damages, or any part thereof, be vested in trustees upon trust to pay the income or capital thereof for the benefit of the minor children, if any, of the marriage or, where the petitioner is required to pay maintenance to the respondent, in or towards the payment of such maintenance, and subject thereto in trust for the petitioner.

(3) Whenever in any petition presented by a husband the alleged adultery has been established against the co-respondent, the court may order the co-respondent to pay the whole or any part of the costs of the proceedings;

Provided that no such order for costs shall be made if the respondent was at the time of the adultery living apart from the husband and living the life of a prostitute or if the co-respondent had not at the time of the adultery reason to believe the respondent to be a married woman.

Hearing of petition.

57. If in any proceedings for divorce the respondent alleges against the petitioner and proves any such fact as is mentioned in section 51 of this Act the court may give the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief.

Decree *nisi* and proceedings thereafter.

58. (1) Every decree of divorce shall in the first instance be a decree *nisi* and shall not be made absolute before the expiration of six months from its grant unless the court by general or special order from time to time fixes a shorter period.

(2) Where a decree *nisi* of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court and on that application the court may—

(*a*) notwithstanding the provisions of the last foregoing subsection, make the decree absolute; or

(*b*) rescind the decree *nisi*; or

(*c*) require further inquiry; or

(*d*) otherwise deal with the case as it thinks fit.

Remarriage of divorced persons.

59. Where a decree of divorce has been made absolute and either—

(*a*) there is no right of appeal against the decree absolute; or

(*b*) the time for appealing against the decree absolute has expired without an appeal having been brought; or

(*c*) an appeal against the decree absolute has been dismissed, either party to the former marriage may marry again.

Proceedings for decree *nisi* of presumption of death and divorce.

60. (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree *nisi* of presumption of death and of divorce.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

(3) Sections 58 and 59 of this Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.

JUDICIAL SEPARATION

Judicial separation.

61. (1) A petition for judicial separation may be presented to the court by either party to a marriage on the ground and circumstances set out in section 51 of this Act and all provisions contained in that section shall, with the necessary modifications, apply in relation to such a petition as they apply in relation to a petition for divorce.

(2) Where a court grants a decree of judicial separation it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(3) The court may, on an application by petition of the spouse against whom a decree of judicial separation has been made and on being satisfied that the allegations in the petition are true, rescind the decree at any time on the ground that it was obtained in the absence of the applicant or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

Judicial separation no bar to petition for divorce.

62. (1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reasons only that the petitioner has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On any such petition for divorce, the court may treat the decree of judicial separation as sufficient proof of the adultery, desertion, or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner.

(3) For the purposes of any such petition for divorce a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation shall, if the parties have not resumed cohabitation and the decree has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

Property of wife after judicial separation.

63. (1) The property of a wife who at the time of her death is judicially separated from her husband shall, in case she dies intestate, go as it would have gone if her husband had been then dead.

(2) Where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife and the same is not duly paid by the husband he shall be liable for necessaries supplied for her use.

NULLITY OF MARRIAGE

Extent of power to grant relief.

64. Nothing herein shall authorise the court to make any decree of nullity of marriage except—

(*a*) where the marriage has been registered or deemed to be registered under the provisions of this Act; or

(*b*) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(*c*) where both the parties to the marriage reside in Malaysia at the time of the commencement of the proceedings.

Petition of nullity for marriage.

65. Any husband or wife may present a petition to the court praying for a decree of nullity in respect of his or her marriage.

Grounds on which a marriage is void.

66. A marriage which takes place after the commencement of this Act shall be void only on the following grounds, that is to say—

(*a*) that it is not a valid marriage under the provisions of sections 5, 10 and 11 of this Act, that is to say, where—

(i) at the time of the marriage either party was already lawfully married and the former husband or wife of such party was living at the time of the marriage and such former marriage was then in force;

(ii) either party is under the age of eighteen or the female not granted special licence;

(iii) the parties are within the prohibited degrees of relationship.

Grounds on which a marriage is voidable.

67. A marriage which takes place after the commencement of this Act shall be voidable on the following grounds only, that is to say—

(*a*) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(*b*) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

(*c*) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(*d*) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Disorder Ordinance, 1952 of such a kind or to such an extent as to be unfitted for marriage;

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(*e*) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;

(*f*) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

Bars to relief where marriage is voidable.

68. (1) The court shall not grant a decree of nullity on any of the grounds mentioned in section 67 of this Act if the respondent satisfies the court—

(*a*) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and

(*b*) that it would be unjust to the respondent to grant the decree.

(2) Without prejudice to sub-section (1) of this section, the court shall not grant a decree of nullity on the grounds mentioned in paragraphs (*e*) or (*f*) of section 67 of this Act unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

(3) Sub-section (1) of this section replaces, in relation to the grounds mentioned in section 67 of this Act any rule of law whereby a decree may be refused by reason of approbation, ratification or lack of sincerity on the part of the petitioner or on similar grounds.

Marriages governed by foreign law or celebrated abroad under Malaysian law.

69. Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of Private International Law) by reference to the law of a country outside Malaysia neither section 66 nor section 67 of this Act shall—

(*a*) preclude the determination of that matter as aforesaid; or

(*b*) require the application to the marriage of the grounds there mentioned except so far as applicable in accordance with those rules.

Effect of decree of nullity in case of voidable marriage.

70. (1) If the court finds that the petitioner's case has been proved it shall pronounce a decree of nullity.

(2) A decree of nullity granted after the commencement of this Act on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the coming into operation of the decree, and the marriage shall, notwithstanding the decree, be t
as if it had existed up to that time.

71. Collusion shall cease to be a bar to the granting of a decree of nullity. Collusion etc., not to be bar to relief in cases of nullity.

72. (1) Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child. Legitimacy where nullity decree made.

(2) Sub-section (2) of section 3 of the Legitimacy Act 1961 (which excludes the operation of that Act in the case of an illegitimate person whose father or mother was married to a third person at the time of the birth) is hereby repealed. No. 11 of 1961.

(3) Subject to the provisions of this section, the child of a void marriage (other than a marriage which is void by virtue of the provisions of section 5 of this Act) shall be treated as the legitimate child of his parent if, at the time of the solemnisation of the marriage, both or either of the parties reasonably believed that the marriage was valid. No. 11 of 1961

(4) This section applies, and applies only, where the father of the child was domiciled in Malaysia at the time of the marriage.

(5) This section so far as it affects the devolution of any property, applies only to children born after the commencement of this Act.

(6) This section does not affect any rights under the intestacy of a person who died before the commencement of this Act, and does not affect the operation or construction of any disposition coming into operation before the commencement of this Act.

(7) Notwithstanding the provisions of section 6 of the Legitimacy Act 1961 all children who are deemed legitimate at birth by virtue of the provisions of this section shall be so treated in all respects and not as persons legitimated at the date of the marriage or the Legitimacy Act 1961 as provided therein. No. 11 of 1961. No. 11 of 1961

(8) Any person claiming otherwise than in a petition for a declaration of nullity of the relevant marriage that a child shall be treated as the legitimate child of his parents by virtue of the provisions of sub-section (3) of this section may apply for a decree to that effect and the provisions of section 5 of the Legitimacy Act 1961 shall apply *mutatis mutandis* to such petition but the court shall not make such a decree unless satisfied by the petitioner that both or either of the parties to the marriage reasonably believed that the marriage was valid as not being in any way contrary to the provisions of section 68 of this Act. No. 11 of 1961.

(9) In this section the following expressions have the meaning hereby assigned to them, that is to say—

"void marriage" mean [sic] a marriage declared to be void under the provisions of sections 5, 10, 11 or 69 of this Act;

"disposition" has the same meaning as in the Legitimacy Act, 1961;

No. 11 of 1961

and any reference in this section to property is a reference to any real or personal property, or any interest in such property, which is limited by any disposition (whether subject to a preceding limitation or charge or not) in such a way as to devolve as nearly as the law permits, whether or not the property or some interest in the property may in some event become severed from it.

PART VII

MATTERS INCIDENTAL TO MATRIMONIAL PROCEEDINGS

Power for court to order division of matrimonial assets.

73. (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by sub-section (1) of this section the court shall have regard to—

(*a*) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(*b*) any debts owing by either party which were contracted for their joint benefit;

(*c*) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

MAINTENANCE OF SPOUSE

Power for court to order maintenance of spouse.

74. (1) The court may order a man to pay maintenance to his wife or former wife—

(*a*) during the course of any matrimonial proceedings;

(*b*) when granting or subsequent to the grant of a decree of divorce or judicial separation;

(*c*) if, after a decree declaring her presumed to be dead, she is found to be alive.

(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.

Assessment of maintenance.

75. In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

Power for court to order security for maintenance.

76. The court may in its discretion when awarding maintenance order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property and, subject thereto, in trust for the settler.

Compounding of maintenance.

77. An agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.

Duration of orders for maintenance.

78. Except where an order for maintenance is expressed to be for any shorter period or where any such order has been rescinded, and subject to the provisions of section 79, an order for maintenance shall expire—

(*a*) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;

(*b*) if the maintenance was secured, on the death of the spouse in whose favour it was made.

Right to maintenance to cease on remarriage.

79. (1) The right of any divorced person to receive maintenance from his or her former spouse under any order of court shall cease on his or her marriage to or living in adultery with any other person.

(2) The right of any divorced person to receive maintenance from his or her former spouse under an agreement shall cease on his or her marriage to any other person unless the agreement otherwise provides.

Power for court to vary orders for maintenance.

80. The court may at any time and from time to time vary, or may rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the

legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Power for court to vary agreements for maintenance.

81. Subject to the provisions of section 77, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the coming into force of this Act, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

Maintenance payable under order of court to be inalienable

82. Maintenance payable to any person under any order of court shall not be assignable or transferable or liable to be attached, sequestered or levied upon for, or in respect of, any debt or claim whatsoever.

Recovery of arrears of maintenance.

83. (1) Subject to the provisions of subsections (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt due from his or her estate.

(2) Subject to the provisions of subsection (3), arrears of unsecured maintenance which accrued due before the death of the person entitled thereto shall be recoverable as a debt by the legal personal representatives of such person.

(3) No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

PART VIII

PROTECTION OF CHILDREN

Meaning of "child".

84. In this Part of the Act, wherever the context so requires, "child" has the meaning of "child of the marriage", as defined in section 2 of this Act who is under the age of eighteen years.

Power for court to make order for custody.

85. (1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard—

(*a*) to the wishes of the parents of the child; and

(*b*) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

Orders subject to conditions.

86. (1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

(2) Without prejudice to the generality of subsection (1), an order for custody may—

(*a*) contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;

(*b*) provide for the child to be temporarily in the care and control of some person other than the person given custody;

(*c*) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;

(*d*) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonably [sic]; or

(*e*) prohibit the person given custody from taking the child out of Malaysia.

Declaratory order as to unfitness of parent to have custody.

87. (1) The court may, when granting a divorce or judicial separation, or at any time thereafter, on the application of the father or the mother of any child of the marriage, make an order declaring either parent to be a person unfit to have the custody of the child and may at any time rescind any such order.

(2) Where an order has been made under subsection (1), and has not been rescinded, the parent thereby declared to be unfit shall not, on the death of the other person, be entitled to the custody of such child unless the court otherwise orders.

Custody of children deemed legitimate.

88. When a child is deemed to be legitimate under the provisions of section 72 of this Act, the mother shall, in the absence of any agreement or order of court to the contrary, be entitled to custody of the child.

Duty to maintain children.

89. (1) Except where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.

(2) Except as aforesaid, it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

Power for court to order maintenance for children.

90. (1) The court may at any time order a man to pay maintenance for the benefit of his child—

(*a*) if he has refused or neglected reasonably to provide for him or her; or

(*b*) if he has deserted his wife and the child is in her charge; or

(*c*) during the pendency of any matrimonial proceedings; or

(*d*) when making or subsequent to the making of an order placing the child in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under subsection (1) or subsection (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

Power for court to order security for maintenance.

91. The court may, in its discretion, when ordering the payment of maintenance for the benefit of any child, order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property, and subject thereto, in trust for the settler.

Duration of orders for custody and maintenance.

92. Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years.

Power for court to vary orders for custody or maintenance.

93. The court may at any time and from time to time vary, or may rescind, any order for custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake or fact or where there has been any material change in the circumstances.

Power for court to vary agreement for custody or maintenance.

94. The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the commencement of this Act, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

Recovery of arrears of maintenance.

95. The provisions of section 83 shall apply, *mutatis mutandis*, to orders for the payment of maintenance for the benefit of any child.

Duty to maintain child accepted as member of family.

96. (1) When a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain such child while he or she remains a child, so far as the father and the mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child:

Provided that the duty imposed by this subsection shall cease if the child is taken away by his or her father or mother.

(2) Any sums expended by a man in maintaining such child shall be recoverable as a debt from the father of the child.

Court to have regard to advice of welfare officers, etc.

97. When considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

Power for court to restrain taking of child out of Malaysia.

98. (1) The court may, on the application of the father or mother of a child—

(*a*) where any matrimonial proceeding is pending; or

(*b*) where, under any agreement or order of court, one parent has custody of the child to the exclusion of the other,

issue an injunction restraining the other parent from taking the child out of Malaysia or may give leave for such child to be taken out of Malaysia either unconditionally or subject to such conditions or such undertaking as the court may think fit.

(2) The Court may, on the application of any interested person, issue an injunction restraining any person, other than a person having custody of a child, from taking the child out of Malaysia.

(3) Failure to comply with an order made under this section shall be punishable as a contempt of court.

OTHER RELIEFS

Power for court to set aside and prevent dispositions intended to defeat claims to maintenance.

99. (1) Where—

(*a*) any matrimonial proceeding is pending; or

(*b*) an order has been made under section 73 and has not been complied with; or

(*c*) an order for maintenance has been made under section 74 or section 90 and has not been rescinded; or

(*d*) maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or child,

the court shall have power on application—

(i) if it is satisfied that any disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his or her spouse of any rights in relation to that property, to set aside the disposition; and

(ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

(2) For the purposes of this section, "disposition" includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money's worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made, and "property" means property of any nature, movable or immovable and includes money.

Injunctions against molestation.

100. The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree of divorce, judicial separation or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.

PART IX

MISCELLANEOUS

Persons exempted from the application of this Act may irrevocably elect to be bound thereby.

101. Notwithstanding the provisions of subsection (2) of section 3 of this Act any person whose religion on personal law permits polygamy may, by a statutory declaration in the prescribed form to be made by him when giving notice of his intended marriage under section 13 of this Act, irrevocably renounce his right to take more than one wife and thereupon all the provisions of this Act shall apply to him as to any other person not exempted by his religion or personal law from compliance with the provisions of this Act.

Recognition of marriage contracted abroad.

102. A marriage contracted outside Malaysia other than a marriage solemnised in a Malaysian Embassy, High Commission or Consulate under the provisions of section 24 of this Act, shall be recognised as valid for all purposes of the law of Malaysia if—

(*a*) it was contracted in a form required or permitted by the law of the country where it was contracted;

(*b*) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicil; and

(*c*) where either of the parties is a citizen of or is domiciled in Malaysia, both parties had capacity to marry according to this Act.

Recognition of marriages contracted in Embassies etc., in Malaysia.

103. A marriage contracted in any foreign Embassy, High Commission or Consulate in Malaysia shall be recognised as valid for all purposes of the law of Malaysia if—

(*a*) it was contracted in a form required or permitted by the law of the country whose Embassy, High Commission or Consulate it is, or in a form permitted under this Act; and

(*b*) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicil; and

(*c*) where either of the parties is a citizen of or is domiciled in Malaysia, both parties had capacity to marry under this Act.

Requirement of reference to conciliatory body before petition for divorce.

104. (1) No person shall petition for divorce, except under section 49 of this Act, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:

Provided that this requirement shall not apply in any case—

(i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse; or

(ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition; or

(iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend; or

(iv) where the respondent is imprisoned for a term of five years or more; or

(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

(vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impracticable.

(2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or, where they are living in different areas, to the marriage tribunal for the area in which they had last resided together.

(3) A "conciliatory body" means—

(*a*) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; or

(*b*) a marriage tribunal; or

(*c*) any other body approved as such by the Minister by notice in the *Gazette*.

(4) A "marriage tribunal" shall be set up for such specified area or district as the Minister may decide, consisting of a Chairman and not less than two nor more than four other members who shall be nominated by the Minister, or by such officer as the Minister may have delegated his powers to in that behalf.

Proceedings of conciliatory body.

(5) (*a*) A conciliatory body to which a matrimonial difficulty has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considered it necessary, adjourn its proceedings from time to time.

(*b*) If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.

(*c*) No advocate or solicitor shall appear or act for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

Maintenance of register of divorces and annulments

105. (1) The Registrar General shall maintain a register of divorces and annulments and shall forthwith enter therein the prescribed particulars of all decrees of divorce and annulment sent to him under subsection (2) of this section and of all decrees of divorce and annulment for the registration of which application is made under subsection (3) of this section.

(2) Every court which grants a decree of divorce or annulment shall forthwith send one certified true copy of the decree to the Registrar General for registration.

(3) Where a marriage which was solemnised in Malaysia is dissolved or annulled by a decree of a court of competent jurisdiction outside Malaysia, either of the parties may apply to the Registrar General for the registration of such decree and the Registrar General, on being satisfied that the decree is one which should be recognised as valid for the purposes of the law of Malaysia, shall register that decree.

(4) Where a decree of divorce or annulment, wherever granted, has dissolved a marriage which was solemnised in Malaysia and which has been registered under the provisions of this Act or any written law heretofore in force, the Registrar General shall, on registering such decree, cause the entry in the register of marriage relating to that marriage to be marked with the word "Dissolved" and a reference to the proceedings in which that decree was granted.

Power to make rules No. 28 of 1955

106. (1) The Rule Committee established under the Rule Committee Ordinance, 1955 may make rules regulating the practice and procedure in all matrimonial proceedings under this Act as they consider expedient and also rules to fix and regulate the fees and costs payable upon all such proceedings; subject thereto all proceedings under this Act shall be regulated by the Rules of the Supreme Court, 1957.

(2) The Minister may make rules for the purposes of this Act and, without prejudice to the generality of the foregoing, such rules may provide for—

(*a*) prescribing the manner in which the Registrars shall exercise the powers conferred on them by this Act;

(*b*) the form of marriage registers and certificates of marriage and the mode in which the same are to be kept;

(*c*) the mode in which the Registrar General, the Registrars and Assistant Registrars shall keep certificates of marriage, marriage registers and indices thereof:

(*d*) the supply and the safe custody of marriage registers, Registrars' note-books and all declarations made for the purposes of this Act;

(*e*) the preparation and submission of returns of marriages solemnised in Malaysia and abroad and of marriages registered under this Act;

(*f*) the forms of any certificates, notices or other documents required for the purpose of carrying out the provisions of this Act;

(*g*) the making of searches and the giving of certified copies;

(*h*) fixing the fees chargeable for the purposes of this Act.

Repeal.

107. The statutes or provisions of statutes specified in the Schedule to this Act are hereby repealed:

No. 74 of 1952.

Provided that all proceedings commenced under the Divorce Ordinance, 1952 hereby repealed shall, so far as practicable, be continued under this Act and for this purpose every petition for divorce other than one on which a decree *nisi* has been granted, shall be deemed to be a petition for divorce under this Act and the grounds set out in the petition shall be deemed to be the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage, but every such petition shall, unless the court otherwise orders, be stayed pending reference to a conciliatory body; and provided further, that where a decree *nisi* has been granted, the proceeding shall continue as if this Act had not been passed.

SCHEDULE

(Section 107)

Civil Marriage Ordinance No. 44 of 1952.

Registration of Marriages Ordinance No. 53 of 1952.

Divorce Ordinance No. 74 of 1952.

Christian Marriage Ordinance No. 33 of 1956.

Legitimacy Act No. 11 of 1961 — only subsection (2) of section 3.

Married Women and Children (Maintenance) Ordinance No. 36 of 1950—the words of limitation "not exceeding fifty dollars" contained in subsection (2) of section 3, when applying the provisions of section 89 or paragraph (*a*) of subsection (1) of section 90 of this Act to the maintenance of any illegitimate child.

EXPLANATORY STATEMENT

This Bill seeks to lay down a uniform law on marriage and divorce, and matters incidental thereto, applicable generally to all non-Muslims resident in Malaysia, as well as to all persons who are citizens of or domiciled in Malaysia residing abroad. Such law is necessary and expedient to replace the heterogeneous personal laws applicable heretofore to persons of different ethnic origins comprising the majority of the non-Muslim population of Malaysia with a diversity of customs and usages observed by them. The primary virtue of the proposed reforms is certainty—replacing doubts regarding the true legal status of women cohabiting with men under circumstances which may or may not be legal wedlock until the question is determined by the Courts and clarifying the legal status of their issue.

SCHEDULE

COMMENTARY BY THE ROYAL COMMISSION ON THE PROVISO TO SUB-CLAUSE (2) OF CLAUSE 3 AND ON THE PROVISIONS OF CLAUSE 101

We have carefully considered the provisions in the Federal Constitution with regard to religion. Under Clause (1) of Article 3 Islam is the religion of the Federation. Article 8 provides, in Clause (1), that all persons are equal before the law and entitled to equal protection of the law; under Clause (2) except as expressly authorised by the Constitution there shall be no discrimination against citizens on the ground only of religion..... in any law.....or in the administration of any law relating to the acquisition, holding or disposition of property and under Clause (5) it is provided that Article 8 does not invalidate or prohibit any provision regulating personal law. Nor have we overlooked the provisions of Articles 74 and 76.

Both the proviso to sub-clause (2) of Clause 3, and the provisions of Clause 101, of the Bill have been drafted so as not to raise any conflict with the provisions of the Constitution relating to the Muslim religion. We are of opinion that, so long as converts to Islam and citizens born in the Islamic faith are not compelled to do anything at all contrary to the Holy Quran, reforms introduced into the municipal law are in no way invalid. The State is not debarred from regulating marriage and divorce in the interests of all its citizens and for their general welfare. Indeed, in many States in the Muslim world, measures have been taken which are restrictive of the wide personal liberty enjoyed by men under Islamic law by imposing certain obligations which formerly were non-existent but in no way contrary to that law. "Marriage in its essentials is a *civil contract* in Muslim law, although it also is of religious significance, being an act commended by the Prophet."(1)

The proviso to sub-clause (2) of Clause 3 applies only to converts to Islam. A man's debts or other civil liabilities towards others are not extinguished by his conversion into Islam or any other religion. By marriage he incurs obligations, both legal and moral, towards his wife and children, whose fundamental rights are recognised in Clauses (1) and (2) of Article 8 of the Constitution. The proviso to sub-clause (2) of Clause 3 is merely a declaration in conformity with Article 8. Any genuine, sincere convert should, as head of his family, have no difficulty in converting his family to his own belief. If he does so, no problem arises. On the other hand, it is common knowledge that, all too often, a man unable to obtain his wife's consent to his taking a second wife, seeks an easy way out and it is our opinion that Muslims do not and should not welcome into the fold pseudo-Muslims who are not worthy of acceptance into Islam.

(1) "Islamic Law in Malaya" by Dr. Ahmad Ibrahim, p. 176

Clause 101 is drafted in recognition of the fact that "a marriage between a Muslim man and a *Kitabiyyah*, as for example a Jewess or a Christian, believing in scriptures the soundness of which is acknowledged by Muslims, is valid."(2) There are many Muslim as well as inter-racial marriages in Malaysia, which are happy and enduring, yet monogamous. Unfortunately, Muslim husbands, in certain cases, have capriciously exercised their rights of *talaq*. Where this happens and a wife, being a foreigner, has by her marriage lost her citizenship under the law of her native land, or a non-Muslim wife and her issue are liable to suffer loss of their inheritance by reason of the husband's conversion, a situation arises for which we feel the laws of this country should make proper provision, for the sake of common humanity, instead of turning a blind eye to it.

To quote from Dr. Ahmad Ibrahim again, at page 107:

> "In order seriously to challenge the essence of these traditional rights of the husband some more extreme and incisive approach was required. Such an approach had been suggested by the great Egyptian reformer, Muhammad 'Abuduh as early as 1898. His argument was that the Quran may be so interpreted as to deny both the right of polygamy and the right of extra-judicial divorce by repudiation. In the first place the Quran qualifies its permission of polygamy by requiring that the husband should be financially capable of supporting a plurality of wives and that he should be able to treat them impartially. If these qualifications should be interpreted not as mere moral injunctions, but as positive legal conditions precedent to the exercise of the right itself, then it would be open to a modern court, in the light of present social circumstances, to hold that these conditions were incapable of fulfilment and thus refuse to sanction a second marriage."

To cite one example, the Tunisian Code of Personal Status of 1956 prohibits polygamy and makes it a criminal offence: Marriage is concluded by the consent of the bridegroom and the bride and divorce can be pronounced only by a court of law (*a*) at the request of one of the spouses on the grounds specified in the Code, (*b*) in the case of mutual consent and (*c*) at the request of one of the spouses, in which case the judge fixes the indemnity due by one spouse to the others: *See* Dr Ahmad Ibrahim at p. 111.

We are therefore of opinion that, there being Muslim precedent for our recommendations, any Muslim man may, in contemplation of marriage to the non-Muslim woman of his choice who demands an assurance that she will not in future be repudiated without just cause, renounce his right to take other wives and contract a civil marriage so as to be bound by all the provisions of the Bill.

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(2) "Islamic Law in Malaya" by Dr. Ahmad Ibrahim, p. 195

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